Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court Of the United States

MARGARET HUDSON,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a homeowner was never afforded procedural due process in regard to the promulgation of an historic zoning district ordinance whether, under the Supremacy Clause, that homeowner's 42 U.S.C. §1983 claim can be barred by Tennessee law which precludes a zoning ordinance from being nullified by procedural irregularities after the ordinance has been in effect for ten or more years.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Margaret Hudson, respectfully requests that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The order of the Supreme Court of Tennessee which denied Margaret Hudson's request for permission to appeal from the opinion rendered by the Tennessee Court of Appeals in this matter is attached as Appendix A. The opinion rendered by the Tennessee Court of Appeals in *Metropolitan Government of Nashville and Davidson County v. Margaret Hudson*, Tenn. Ct. App. Case No. M2002-02847-COA-R3-CV, is attached as Appendix B. The order and amended order entered by the Chancery Court for Davidson County, Tennessee in *Metropolitan Government of Nashville and Davidson County v. Margaret Hudson*, Case No. 98-406-I, which granted the municipality summary judgment, are attached as Appendix C.

STATEMENT OF JURISDICTION

The order of the Supreme Court of Tennessee which denied Petitioner an appeal from the opinion rendered by the Tennessee Court of Appeals was entered on June 21, 2004. [App. A]

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Rule 10(c) of the Rules of the Supreme Court of the United States,

for a Writ of Certiorari to review the opinion rendered by the Tennessee Court of Appeals which relied upon Tennessee law to bar a 42 U.S.C. §1983 claim in violation of the Supremacy Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part: "...nor shall any state deprive any person of life, liberty or property, without due process of law ..."

Title 42, United States Code §1983 provides in pertinent part:

> "Every person who, under the color of any statute, ordinance, regulation, custom or usage of any State..., subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress..."

The Supremacy Clause of Article VI of the United States Constitution provides that:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be

made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

STATEMENT OF THE CASE

A. Proceedings in the Courts Below

Mrs. Margaret Hudson is 82 years old and has resided at 1014 Lawrence Avenue in Nashville, Tennessee since 1966. [Appendix M, ¶1, p. 48a]

In 1980 the Woodland-in-Waverly National Historic District ("District A") was established in Nashville, Tennessee which included 85 houses, 10 of which were not considered to be historic structures. [Appendix M, ¶3 & 4, p. 48a-49a] No zoning restrictions applied to the historic structures in the Woodland-in-Waverly Historic District at this time. Mrs. Hudson's White Avenue property was not located in the Woodland-in-Waverly Historic District. [Appendix M, ¶3, p. 48a]

In 1982 Mrs. Hudson and her late husband purchased a home located at 2208 White Avenue for $14,770 as an investment for her retirement years. [Appendix M, ¶2, p. 48a]

On May 28, 1985 the Metropolitan Historic Zoning Commission mailed an information packet

on historic zoning including draft guidelines to all of the proposed district's residents and announced a public hearing set for June 13, 1985 to discuss the designation and review guidelines. [Appendix B, p. 5a] For purposes of the summary judgment motion in this case, it was undisputed that Mrs. Hudson never received actual notice of any meetings, public hearings or proceedings related to the adoption of the Woodland-in-Waverly Historic Zoning District Guidelines. [Appendix E & F, No. 9, pp. 25a, 27a] At the time notice was given, Mrs. Hudson and her late husband were not residents of the proposed district. [Appendix D, No. 2, p. 19a] Mrs. Hudson's mailing address as owner of the White Avenue property was listed with the Metropolitan Property Assessor and Metropolitan Trustee for payment of taxes as 1014 Lawrence Avenue, Nashville, TN 37204 and not the White Avenue address. [Appendix M, ¶8, p. 51a] Information sent by the Respondent to Mrs. Hudson was sent to the White Avenue property where she did not live.

The Metropolitan Council passed Council Bill No. 085-1021 which created the Woodland-in-Waverly Historic Zoning District on November 19, 1985. [Appendix E & F, No. 7, pp. 24a and 27a] The mayor signed the bill on November 25, 1985. [Appendix E & F, No. 8, pp. 24a & 27a] The Woodland-in-Waverly Historic Design Guidelines were adopted by the Metropolitan Historic Zoning Commission on November 25, 1985. [Appendix E & F, No. 6, pp. 24a & 27a] These regulations restrict the repair and maintenance of historic homes. While the Design Draft Guidelines

circulated in 1985 did not contain a specific prohibition regarding the installation of vinyl siding, the final Design Guidelines adopted by the Metropolitan historic Zoning Commission on November 25, 1985 prohibited the use and installation of vinyl siding on historic homes in the District. [Appendix D, No. 5, p. 20a]

The Woodland-in-Waverly Historic Zoning District not only included the houses in District A, the original Woodland-in-Waverly National Historic District but also an additional 72 homes in "District B". [Appendix M, ¶4, p. 49a] Mrs. Hudson's White Avenue property is located in District B. [Appendix M, ¶4, p. 49a]

Of the 85 homes included in District A of the Woodland-in-Waverly Historic Zoning District, 75 were considered to be historic and 10 nonhistoric in 1985. [Appendix E & F, No. 12, pp. 25a, 27a] Of the 72 homes in "District B," 27 were considered to be historic and 45 nonhistoric in 1985. [Appendix E & F, Nos. 11 & 13, pp. 25a-27a] In all, a total of 102 historic homes were covered by the zoning regulations promulgated by the Metropolitan Historic Zoning Commission in 1985 in regard to the Woodland-in-Waverly Historic Zoning District.

During the time that Mrs. Hudson owned the White Avenue property, she had had maintenance performed on the house, including re-roofing and repainting the exterior wood siding at least twice. [Appendix M, ¶10, p. 53a] Nothing in her management of the property or contact with persons in the neighborhood led her to

believe that she was restricted or prohibited in the manner in which she maintained the property. [Id.]

In late May or early June, 1996 Mrs. Hudson hired a contractor to install vinyl siding on the White Avenue property at a cost of $7,000, [Appendix M, ¶12, p. 53a] The vinyl siding was installed over a period of several days. [Appendix M, ¶13, p. 54a]

In late December, 1996 or early January, 1997, Mrs. Hudson was served with a notice to appear before the Metropolitan Historic Zoning Commission to answer its complaint against her for installing vinyl siding on the White Avenue property. [Appendix M, ¶14, p. 54a] Receipt of this notice was the first time that either Mrs. Hudson or her late husband, James T. Hudson, ever had notice or other information from the Metropolitan Government or anyone else about the formation of an historic zoning district that included their White Avenue property or about the adoption of the historic district design guidelines by the Metropolitan Historic Zoning Commission that applied to the White Avenue property. [Appendix M, ¶7, p. 52a]

The expense of removing the vinyl siding on the White Avenue property and repairing and restoring the wooden siding on the house to its original condition is in the range of $18,000 to $40,000. [Appendix E & F, No. 4, pp. 23a - 24a, 27a] For tax purposes the White Avenue property has been appraised as being worth $45,200. [Appendix M, ¶12, p. 53a]

Of the total of 72 houses in the District B Section of the Woodland-in-Waverly Historic Zoning District, 30 are considered post-1970 type brick duplex houses. Of the 42 remaining houses, 14 have vinyl or aluminum siding, 11 have asbestos shingle siding and 1 has a mixed brick and shingle siding, all of which are not permitted under the Woodland-in-Waverly Historic Zoning District guidelines. [Appendix E & F, No. 13, pp. 26a - 27a]

On February 10, 1999, the Metropolitan Government filed suit in the Chancery Court for Davidson County, Tennessee against Mrs. Hudson, seeking an injunction to force her to remove the vinyl siding that had been installed on her White Avenue property and to restore the property to its original condition.

Mrs. Hudson filed an Answer and a Counter Complaint in which she alleged that her constitutional right to procedural due process guaranteed by the Fourteenth Amendment of the United States Constitution had been violated by her failure to receive notice concerning the inclusion of her White Avenue property in the Woodland-in-Waverly Historic Zoning District and notice of the zoning regulations which limited how she could maintain and repair her White Avenue property. [Appendix H, pp. 32a - 37a] Mrs. Hudson asserted a 42 U.S.C. §1983 claim against the Respondent for the violation of her constitutional rights. [Appendix H, Counter Complaint, p. 35a - 36a]

The Chancery Court for Davidson County, Tennessee granted summary judgment to the Metropolitan Government of Nashville and Davidson County, finding that the White Avenue property was located in the Woodland-in-Waverly Historic District, that the design guidelines were properly adopted, valid and enforceable, that the guidelines prohibit installation of vinyl siding and that Mrs. Hudson's installation of vinyl siding violated these guidelines. The trial court enjoined Mrs. Hudson to remove all vinyl siding from the house. [Appendix C, Order, pp. 12a - 13a] The trial court later entered an Amended Order which dismissed Mrs. Hudson's constitutional claims and her 42 U.S.C. §1983 action. [Appendix C, Amended Order, pp. 15a - 16a]

Mrs. Hudson timely filed a Notice of Appeal which stated, in pertinent part, that she was appealing the dismissal of her 28 U.S.C. §1983 claim to the Tennessee Court of Appeals. [Appendix L, p. 45a]

The Tennessee Court of Appeals affirmed the trial court's grant of summary judgment to the Metropolitan Government of Nashville and Davidson County. Although it recognized that the Metropolitan Government of Nashville and Davidson County had failed to comply with Tennessee law in regard to the notice requirements governing the adoption of the Historic Zoning Commission design guidelines, it affirmed the trial court's dismissal of Mrs. Hudson's 42 U.S.C. §1983 claim because Tennessee law provides that "after long public acquiescence in the substance of an ordinance,

public policy does not permit ... an attack on the validity of the ordinance because of procedural irregularities," citing *Hutcherson v. Criner*, 11 S.W.3d 126, 134 (Tenn. Ct. App. 1999). [Appendix B, p. 9a] Since the historic designation and review guidelines were adopted in 1985 and were challenged by Mrs. Hudson "well over ten years later," the Tennessee Court of Appeals affirmed the trial court's dismissal of Mrs. Hudson's constitutional claims. [Appendix B, p. 10a]

In an order entered on June 21, 2004, the Tennessee Supreme Court denied Mrs. Hudson permission to appeal from the opinion rendered by the Tennessee Court of Appeals. [Appendix A, p. 1a]

B. Mrs. Hudson's Procedural Due Process Claim

The Respondent was under constitutional due process constraints when it promulgated the zoning regulations for the historic houses in the Woodland-in-Waverly Historic Zoning District. These regulations did not affect everyone in the District equally. Rather, more than 62% of the houses in "District B" were not considered to be historic homes in 1985. [App. E and F, No. 11, pp. 27a, 27a] Mrs. Hudson's property was one of only 27 homes considered to be historic in "District B". [App. M, ¶4, p. 49a] 75 of the 85 homes in "District A" were considered to be historic in 1985. [Appendix E & F, No. 12, pp. 25a, 27a] Out of a total of 157 homes in both

Districts, 102 were considered to be historic in 1985. [App. E & F, Nos. 11-13, pp. 25a - 27a]

While the law is clear that procedural due process constraints do not apply to statutes that apply equally to all concerned, *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1914), procedural due process requirements do apply when a zoning ordinance is promulgated that affects a relatively small number of persons who are exceptionally affected in each case on individual grounds. *Londoner v. Denver*, 210 U.S. 373, 385 (1908); see, *Harris v. County of Riverside*, 904 F.2d 497, 501-502 (9th Cir. 1990) (analyzing the distinction between situations in which *Bi-Metallic* governs when no procedural due process is required and situations in which *Londoner* mandates that individuals are entitled to receive procedural due process.)

In the case at bar, 102 homes in the entire Woodland-in-Waverly Historic Zoning District were considered to be "historic" in 1985 and subject to the zoning regulations. These regulations subjected the owners of these historic buildings to onerous requirements in repairing and maintaining their buildings. As one commentator has noted "...the costs of maintaining, restoring and repairing old buildings increase with time. What begins as a modest measure for the preservation of decay advances to a very costly and burdensome restoration payout, and eventually the need for complete reproduction of the original structure." Lewinshon-Zamir, 20 HARVARD JOURNAL OF LAW AND PUBLIC POLICY, The Conservation

Game: The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance, 733, 739 (1997).

The zoning guidelines at issue dictate how an owner can maintain and repair their home. The facts in this case lean much greater toward the *Londoner* case than the *Bi-Metallic* case. The Respondent was bound by procedural due process constraints when it promulgated the zoning regulations in controversy that applied to the Woodland-in-Waverly Historic Zoning District. This conclusion is buttressed by the fact that T.C.A. §13-7-406 requires that prior to the establishment of any historic district, an historic zoning commission is required to adopt a set of review guidelines and that reasonable notice and opportunity for public comment is required before any review guidelines can be adopted. The Metropolitan Code promulgated by Respondent mandates that in regard to the adoption of historic zoning design guidelines, that no public hearing can be conducted unless "at least 21 days prior to the public hearing, the owner of the subject property and all other property owners within the distances prescribed in this article have been given notice by mail of the time, date and place of the public hearing and that notice in a daily newspaper of general circulation in Davidson County is published no less than 21 days and no more than 30 days before the hearing." [App. B, p. 9a] There is no dispute that the Respondent never complied with these notice requirements in regard to the Woodland-in-Waverly Historic Zoning District and its review guidelines.

Further, Mrs. Hudson's interest in having the right to use and repair her White Avenue property is a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Under Tennessee law a landowner in occupying his property "may use his land according to his own judgment without being answerable to an adjoining owner, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him an injury." *Humes v. Mayor and Aldermen of Knoxville,* 20 Tenn. (1 Hump.) 403 (1839). The manner in which one chooses to use their property is a property right in Tennessee. This Court has applied the Due Process Clause to protect a property owner's right to use his or her property. See, *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121 (1928) (The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."); see also, *Harris v. County of Riverside,* 904 F.2d 497 (9th Cir. 1990) (holding that the loss of use of property because of a rezoning of that property constituted a taking in violation of the constitutional right to procedural and substantive due process.)

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*

v. Central Hanover Bank & Trust Co., Trustee, 339 U.S. 306, 314 (1950). "... [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it ..." *Id.*, 339 U.S. at 315.

In the case at bar the respondent sent notice by mail to people residing in the Woodland-in-Waverly Historic Zoning District. Unfortunately, Mrs. Hudson and her late husband lived outside the district. The Hudsons' residential address, 1014 Lawrence Avenue, Nashville, Tennessee, was listed for the White Avenue property in the Metropolitan Property Assessor's Office and the Metropolitan Trustee's Office as owners of record for tax payment purposes. [App. M, ¶8, p. 52a)

In several cases this Court has held that constructive service violates the requirements of procedural due process when the governmental entity has the name and address of the person entitled to notice in its deed and tax records. See, *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Schroeder v. New York City*, 371 U.S. 208 (1962); and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The Respondent's sending of notice of a June 13, 1985 public hearing and proposed guidelines which contained no prohibition of the use of vinyl siding on historic homes by mail to individuals in the Woodland-in-Waverly Historic Zoning District at a time when Mrs. Hudson's

residential address, 1014 Lawrence Avenue, Nashville, Tennessee, was listed as owner of record of the White Avenue property with the Metropolitan Property Assessor's Office and the Metropolitan Trustee's Office was constitutionally insufficient. Anyone who really wanted to convey actual notice to Mrs. Hudson of the zoning regulations that would be applied to her White Avenue property would have sent correct information to her residential address where it would have reached her and would have given her further notice that vinyl siding would be prohibited on historic homes.

The Tennessee Court of Appeals dismissed Mrs. Hudson's 42 U.S.C. §1983 claim based upon its determination that under Tennessee law, after a period of 10 years has elapsed, the public is deemed to have acquiesced in zoning regulations and that Tennessee courts will not declare an ordinance invalid because of procedural irregularities in the promulgation of that ordinance. [App. B, pp. 9a - 10a] We submit that this holding violates the Supremacy Clause of the United States Constitution.

It is important to note that the statute of limitations has never been raised in this case. [App. I, Answer to Counterclaim, pp. 38a - 39a]. The Tennessee Court of Appeals appears to have fashioned a "statute of repose" that bars a legitimate procedural due process claim under a theory that the public has acquiesced in the constitutional violation.

Mrs. Hudson is seeking to recover under 42 U.S.C. §1983 for the costs of complying with the zoning regulation in controversy. Since the respondent violated Mrs. Hudson's constitutional right to procedural due process which resulted in her ignorance of the zoning ordinance in controversy, it is only fair that the Respondent be held liable for the expenses Mrs. Hudson will incur when she is forced to comply with this zoning regulation. This is basic, fundamental justice.

REASON FOR GRANTING THE WRIT

I. The Tennessee Court of Appeals Has Decided an Important Question of Federal Law that Conflicts with Relevant Decisions of this Court.

A. This appeal presents an important question of law.

42 U.S.C. §1983 has become important in challenges to municipal land use decisions during the last few years primarily because it allows a plaintiff to recover damages. "In recent times, actions challenging local land use decisions and brought under 42 U.S.C. §1983 have been increasingly frequent and important." WILLIAMS, AMERICAN LAND PLANNING LAW, §99.1, 183-184 (2003 Rev. Ed.) "The traditional remedy usually employed in land use decisions has, of course, been invalidation of an ordinance or other

action interfering with protected rights. Less frequently, a court has been willing to mandate that a municipality actually issue a permit or take some form of action. What has not, though, to any substantial degree, been available as a form of relief has been damages, although some courts have in the past awarded damages, on the theory of inverse condemnation, and some are beginning to do so on anti-trust grounds. The evolution of §1983, however, means damages will be available when a land use decision is held to violate protected rights." WILLIAMS, AMERICAN LAND PLANNING LAW, §99.5, p. 191 (2003 Rev. Ed.)

While the decision rendered by the Tennessee Court of Appeals in this matter is the only case of which counsel is aware that has relied on state law in dismissing a 42 U.S.C. §1983 claim for a violation of procedural due process guaranteed by the Fourteenth Amendment, state courts are split on the issue of whether a zoning ordinance can be held void for procedural irregularities, including lack of notice to property owners, if that ordinance has been in effect for 10 or more years. One line of cases, epitomized by *LaSalle National Bank vs. City of Evanston*, 179 N.E.2d 673 (Ill. 1962) holds that "[a] zoning ordinance cannot be sustained if in violation of the Constitution, no matter how long or by whom it has been recognized as legal and the fact that the purchaser or his grantor may have acquiesced in the classification will not estop him from testing its validity." 179 N.E.2d at 676. See, *Carter v. City of Salina*, 773 F.2d 251, 254 (9th Cir. 1985) ("It is the general rule that zoning ordinances are in derogation of common

law property rights and find their authority through the state police power; accordingly, municipalities and other political subdivisions must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law.") (Applying Utah law) These courts emphasize that procedural defects regarding an absence of notice of a public hearing are the type of defects that inherently lead to a delay in the bringing of a challenge to a zoning ordinance. *Pennington County v. Moore,* 525 N.W.2d 257, 260 (S.D. 1994)

The Tennessee Court of Appeals, in dismissing Mrs. Hudson's 42 U.S.C. §1983 claim, followed a contrary line of authority which precludes an attack on the validity of a zoning ordinance because of procedural irregularities such as lack of notice of a hearing after the ordinance has been in effect 10 or more years. *Fifth Church of Christ, Scientist v. W. F. Pigg & Son,* 122 P.2d 887 (Colo. 1942); *Taylor v. Schlemmer,* 183 S.W.2d 913 (Mo. 1944). While not allowing a zoning ordinance to be attacked on procedural due process grounds, these jurisdictions will allow a property owner to raise a substantive due process challenge to the zoning ordinance in controversy. See, *Taylor v. Schlemmer, supra* at 917, holding that the zoning ordinance was reasonable and not arbitrary.

Given the split in jurisdictions on the validity of a procedural due process claim after a zoning ordinance has been on the books for 10 or more years and the increasing use of 42 U.S.C.

§1983 as a vehicle to recover damages for persons aggrieved by a municipal land use decision, the issue presented in this case is an important one the courts will be facing in the future.

B. The decision rendered by the Court of Appeals conflicts with relevant decisions of this Court.

Article VI of the Constitution provides that "the laws of the United States shall be the supreme law of the land; ... anything in the constitution or laws of any state to the contrary notwithstanding." Art. VI, cl 2. Thus, since "...*McCulloch v. Maryland*, 4 Wheat 316, 427 (1819), it has been settled that state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, (1992). In applying the Supremacy Clause, this Court has noted that "our office is not to pass judgment on the reasonableness of state policy. It is instead to decide if a state rule conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." *Lividas v. Bradshaw*, 512 U.S. 107, 120 (1994).

The utilization of 42 U.S.C. §1983 to recover damages for a procedural due process violation in regard to a municipal land use decision is exactly the purpose for which that statute was promulgated. When Congress promulgated this legislation as §1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, "[I]ts purpose

[was] plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment of the Constitution of the United States and other Purposes.'" *Monroe v. Pape*, 365 U.S. 167, 171 (1961). This Court has noted that one of the several purposes of 42 U.S.C. §1983 was to "provide a remedy where state law is inadequate." *McNeese v. Board of Education*, 373 U.S. 668, 671-672 (1963). As the decision rendered by the Tennessee Court of Appeals in this case makes abundantly clear, state law provides Mrs. Hudson with no remedy for the violation of her right of procedural due process guaranteed by the Fourteenth Amendment in this case.

The Tennessee state law relied upon by the Tennessee Court of Appeals for its dismissal of Mrs. Hudson's 42 U.S.C. §1983 claim directly conflicts with and undermines the objectives of that federal legislation. Indeed, as noted above, one of the primary purposes of the promulgation of 42 U.S.C. §1983 was to create a remedy when state law failed to provide one for a violation of the constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision rendered by the Tennessee Court of Appeals conflicts with the decisions rendered by this Court which have interpreted and applied the Supremacy Clause of the United States Constitution and undermines a primary federal objective sought to be achieved in the promulgation of 42 U.S.C. §1983.

CONCLUSION

Wherefore, since the Tennessee Court of Appeals' decision directly conflicts with 42 U.S.C. §1983 and undermines a primary federal objective in the promulgation of that statute and, thus, conflicts with relevant decisions by this Court interpreting the Supremacy Clause of the United States Constitution, the Court is urged to grant this Petition for Writ of Certiorari, reverse the judgment rendered by the Tennessee Court of Appeals and remand this case to the Chancery Court for Davidson County for a trial on the merits.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

v.

MARGARET HUDSON

Chancery Court for Davidson County
No. 98-406I

No. M2002-02847-SC-R11-CV

FILED JUN 21 2004

ORDER

Upon consideration of the application for permission to appeal of Margaret Hudson and the record before us, the application is denied.

PER CURIAM

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 6, 2003 Session

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY

v.

MARGARET HUDSON

Chancery Court for Davidson County
No. 98-406-I

No. M2002-02847-COA-R3-CV

FILED DEC 30 2003

JUDGMENT

This cause came on to be regularly heard and considered by this Court, and for the reasons stated in the Opinion of this Court, of even date, it is Ordered:

1. The judgment of the trial court is affirmed and this cause remanded for further proceedings consistent with this opinion.

2. Costs of this appeal are taxed against the appellant, Margaret Hudson, and her surety, for which execution may issue if necessary.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 6, 2003 Session

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

v.

MARGARET HUDSON

Direct Appeal from the Chancery Court
for Davidson County
No. 98-406I
Irvin H. Kilcrease, Jr., Chancellor

No. M2002-02847-COA-R3-CV

FILED DEC 30 2003

This case involves an appeal from the trial court's grant of Appellee's motion for summary judgment. Appellee filed suit seeking to enjoin Appellant to remove vinyl siding that she had installed on her house in violation of a historic zoning ordinance. Appellant counter-complained alleging that the ordinance was void and unenforceable on grounds that the ordinance was unconstitutional and never properly adopted. Appellee subsequently moved for summary judgment which the trial court granted. We affirm.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Chancery Court Affirmed;
and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and WILLIAM CAIN, J., joined.

Joseph H. Johnston and Marbut Glenn Gaston, Jr., Nashville, Tennessee, for the Appellant, Margaret Hudson.

Lora A. Barkenbus, Metropolitan Attorney, Nashville, Tennessee, for the Appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

In 1982, Defendant/Appellant, Margaret Hudson (Mrs. Hudson) bought a house located on White Avenue (White Ave. property) in Nashville, Tennessee, as an investment property. During all times pertinent to this case, Mrs. Hudson lived in another Nashville home (Lawrence Ave. property) located some fifteen blocks away from the White Ave. property. On November 19, 1985, the Metropolitan Council passed a bill creating the Woodland-in-Waverly Historic District that would include the White Ave. property. That bill was signed by the Mayor of Nashville on November 25, 1985, and by the language of the ordinance became effective five days after its passage, November 30, 1985. On November 25, 1985, the Metropolitan Historic Zoning Commission (MHZC) adopted the Woodland-in-Waverly Historic Zoning Design Guidelines. These guidelines prohibited the installation of vinyl siding on houses located within the district.

In late May or early June of 1996, Mrs. Hudson hired a contractor, Southern Aluminum Company, to install vinyl siding on the White Ave. property.[1] On February 10, 1998, the Metropolitan Government of Nashville and Davidson County (Metro) filed suit against Mrs. Hudson seeking to enjoin her to

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[1] The Metropolitan Government of Nashville and Davidson County originally brought actions against Mrs. Hudson and Southern Aluminum Company seeking to enjoin both from violating the zoning ordinance. Souther Aluminum Company was dismissed from the current action by summary judgment order entered by the trial court.

remove the vinyl siding. On December 13, 2000, Mrs. Hudson answered and counter-complained arguing that the guidelines were void because they had never been adopted by Metro, were unconstitutionally vague, that enforcement amounted to a taking without compensation, and violated her right to due process under the Fourteenth Amendment because she never received notice of their adoption.

Metro filed a motion for summary judgment. Accompanying the motion was the affidavit of the director for the MHZC. In the affidavit, the director recounted the forms of notice given to residents of the Woodland-in-Waverly district: In 1983, the Metropolitan Historical Commission had its first public meeting in the Woodland-in-Waverly neighborhood to discuss possible historic zoning status. On May 28, 1985, the MHZC mailed an information packet on the historic guidelines including draft guidelines to all of the proposed district's residents and announced a public hearing set for June 13, 1985, to discuss the designation and review guidelines. In addition to the June MHZC public hearing, the Davidson County Metropolitan Council held a public hearing on November 5, 1985. On November 25, 1985, the guidelines for the historic district were adopted at a public meeting of the MHZC. Upon adoption, notice were distributed around the neighborhood informing the residents of the historic designation and procedures for applying for a certificate of appropriateness before changing the exterior of any structure. Notice of the newly formed zoning district ran in the Tennessean newspaper. In another affidavit filed with the court, Mrs. Hudson stated that she had never been informed of the historical designation. Mrs. Hudson further stated that the White Ave. property mailing address on filed with Metro's Property Assessor and Trustee was her Lawrence Ave. property address, where she was currently residing, as opposed to the

property's actual address, which was attached to the mailing list of the original notices.

The trial court granted Metro's motion for summary judgment. The trial court specifically found that the historic zoning guidelines were properly adopted and enforceable, that Mrs. Hudson's house was located within the historic district, that the guidelines prohibited the installation of vinyl siding, and that Mrs. Hudson's installation of vinyl siding, after the guidelines were adopted, violated the zoning ordinance. In an amended order, the trial court dismissed Mrs. Hudson's claims contained in the counter-complaint, finding them not meritorious.

Issues Presented

Mrs. Hudson raises the following issues, as we perceive them, for review by this Court:

1. Whether failure to mail notices of public hearing on the establishment of a historic district, and on the subsequent adoption of review guidelines to Mrs. Hudson's correct address, as required by Article XV of the Metropolitan Zoning Code, constitutes a denial of due process, guaranteed under the Fourteenth Amendment of the United States Constitution and Article I, Section 8 of the Tennessee Constitution.

2. Whether the Historic Zoning Enabling Statutes, which authorize the MHZC to adopt review guidelines of the appropriateness of improvements to property within a historic district prior to the establishment of the historic district require that the review guidelines be adopted prior to the legislative establishment of the historic district.

Standard of Review

This Court must decide whether it was error for the trial court to award summary judgment to Metro. Summary judgment should be awarded when the moving party can demonstrate that there are no genuine issues regarding material facts and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *McCarley v. W. Quality Food Serv.*, 960 S.W. 2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W. 2d 208, 214 (Tenn. 1993). Mere assertions that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. *McCarley*, 960 S.W. 2d at 588. The moving party must either conclusively demonstrate an affirmative defense or affirmatively negate an element which is essential to the non-moving party's claim. *Id.* If the moving party can demonstrate that the non-moving party will not be able to carry its burden of proof at trial on an essential element, summary judgment is appropriate. *Id.*

This Court reviews an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W. 3d 528, 534 (Tenn. 2002). In determining whether to award summary judgment, we must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assoc.*, 15 S.W. 3d 83, 89 (Tenn. 2000). Summary judgment should be awarded only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. *Id.* If there is any doubt about whether a genuine issue of material fact exists, summary judgment should not be awarded. *McCarley*, 960 S.W. 2d at 588.

Notice

Mrs. Hudson argues that the MHZC's forms of notice did not comply with the Metropolitan Code of Nashville and

Davidson County (Metropolitan Code) and, as a result, constitute a denial of due process under the Tennessee and United States Constitutions. Tennessee Code Annotated § 13-7-406 (1999) addresses the notice and public hearing required for adoption of historic zoning review guidelines. It provides, in pertinent part:

> [p]rior to the establishment of any historic district or zone, the historic zoning commission . . . shall adopt for each such proposed district or zone a set of review guidelines . . . . Reasonable public notice and opportunity for public comment, by public hearing or otherwise, shall be required before the historic zoning commission or the regional historic zoning commission adopts any such review guidelines.

The Metropolitan Code has further defined "reasonable public notice" in Article XV. *See* Code of the Metropolitan Government of Nashville and Davidson County, Tennessee, Article XV (1991). For the notice requirements of Article XV to apply, some other provision of the Metropolitan Code must require a public hearing. *Id.* § 17.40.700. Section 17.40.410(B) of Article IX, Historic Zoning Commission, requires that "[t]he historic zoning commission shall adopt design guidelines for each historic overlay district . . . . A *public hearing* following the applicable public notice requirements of Article XV of this chapter shall precede the adoption of all design review guidelines by the historic zoning commission." *Id.* § 17.40.410(B) (emphasis added). Consequently, Article XV requires that:

> [17.40.710 Notice by newspaper:] [n]o public hearing shall be conducted unless notice has been given in one or more daily newspapers of general circulation in Davidson County no less than twenty-one days nor more than thirty days prior to the public hearing.

> [17.40.720 Notice by mail:] [n]o public hearing shall be conducted unless, at least twenty-one days prior to the public hearing, the owner(s) of the subject property and all other property owners within the distances prescribed by this article have been given notice by mail of the time, date and place of the public hearing.

In this case, the only evidence in the record of notice by newspaper was the publication of the adoption of the historical zoning designation rather that the required newspaper notice of a public hearing for comment on review guidelines. As a result, MHZC failed to meet the notice by newspaper requirement of § 17.40.710. Further, the affidavit of the director for the MHZC stated that notices of public hearing, scheduled for June 13, 1985, accompanied by draft review guidelines were mailed on May 28, 1985. Accordingly, MHZC's notice by mail does not meet the twenty-one day notice requirement of § 17.40.720.

However, "'after long public acquiescence in the substance of an ordinance, public policy does not permit . . . an attack on the validity of the ordinance because of procedural irregularities.'" *Hutcherson v. Criner*, 11 S.W. 3d 126, 134 (Tenn. Ct. App. 1999) (quoting *Trainor v. City of Wheat Ridge*, 697 p.2d 37, 39 (Colo. Ct. App. 1984)) (citing *Edel v. Filer Township*, 211 N.W. 2d 547 (Mich. Ct. App. 1973); *Taylor v. Schlemmer*, 183 S.W. 2d 913 (Mo. 1944); *Struyk v. Samuel Braen's Sons*, 85 A. 2d 279 (N.J. Super. Ct. App. Div. 1951)); *see also* 83 Am. Jur. 2d *Zoning and Planning* § 511 (2003) (stating that a protracted delay may prevent a party from challenging a legislative body's failure to comply with the notice requirements of an enabling statute); *Schlemmer*, 183 S.W. 2d at 915-16 (holding that the city's failure to comply with the notice requirements of its zoning ordinance's enabling act was a procedural defect which could not be challenged twelve years after its adoption). In *Criner*, this Court used ten

years as the benchmark duration to immunize a zoning ordinance from procedural attack. *Criner*, 11 S.W. 3d at 135. The rationale behind such immunity is the extensive public reliance on the zoning ordinance resulting from a long duration of acquiescence. *Id.* In this case, the historic designation and review guidelines were adopted in 1985 and were first challenged by Mrs. Hudson in December of 2000 in her counter complaint. This delay, well over ten years, prevents Mrs. Hudson from challenging the MHZC's failure to comply with the procedural notice requirements enumerated in the Metropolitan Code. Accordingly, the trial court's grant of Metro's motion for summary judgment dismissing Mrs. Hudson's constitutional claims is affirmed.

Timing of Adoption

Mrs. Hudson next argues that the historic designation of the Woodland-in-Waverly district and its applicable review guidelines are not enforceable because their adoption did not comply with Tenn. Code Ann. § 13-7-406 (1999). This section provides that "[p]rior to the establishment of any historic district or zone, the historic zoning commission . . . also shall adopt for each such proposed district or zone a set of review guidelines . . . ." Assuming *arguendo* that Metro did not comply with the statute in its adoption of the guidelines and designation, Mrs. Hudson's delay in challenging the procedural defects of the zoning ordnance's adoption immunize it from attack. *Criner*, 11 S.W. 3d at 134-35. Accordingly, the trial court's grant of Metro's motion for summary judgment on the validity of the historic zoning ordinance's adoption is affirmed.

Conclusion

In light of the foregoing, we affirm the trial court's grant of Metro's motion for summery judgment and dismissal of Mrs. Hudson's constitutional counterclaims. Costs of this appeal are

taxed to the Appellant, Margaret Hudson, and her surety, for which execution may issue is necessary.

/s/ David R. Farmer
DAVID R. FARMER, JUDGE

APPENDIX C

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY , TENNESSEE,
Plaintiff,

MARGARET HUDSON
Defendant.

No. 98-406-I
Notice of Entry Requested

RECEIVED SEP 12 2002
Dav. Co Chancery Court

FILED 2002 SEP18 AM 11:24
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

ORDER

The Plaintiff's motion for summary judgment was heard on September 6, 2002. After hearing the arguments of counsel and reviewing the record, the Court finds the following:

1. The historic zoning overlay and design guidelines for the "Woodlands in Waverly" Historic District that were adopted in 1985 were properly adopted and are valid and enforceable.

2. Defendant's house is located in this historic district.

3. The design guidelines prohibit the installation of vinyl siding on houses within the district.

4. The design guidelines were in place when Defendant installed the vinyl siding on her house. Defendant's use of vinyl siding violates these guidelines. The Court must enforce the ordinance, therefore Plaintiff's motion for summary judgment is supported by the record, is meritorious and is granted.

It is therefore ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment is GRANTED.

It is further ORDERED, ADJUDGED and DECREED that an injunction shall be issued requiring that the vinyl siding be removed from the defendant's house and will go into effect thirty days from date of entry of this Order. *[Handwritten note: Costs taxed to the defendant. IHK Jr.]*

ENTERED on this 18 day of September, 2002.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE
CHANCELLOR

APPROVED FOR ENTRY:

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
KARL F. DEAN, #10419
DIRECTOR OF LAW

/s/ Margaret O. Darby
MARGARET O. DARBY, #20701
Metropolitan Attorney
204 Metropolitan Courthouse
Nashville. Tennessee 37201
615) 862-6341

/s/ Lora Barkenbus

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[Certification of Service Omitted in Printing]

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY , TENNESSEE,

Plaintiff,

v.

MARGARET HUDSON

Defendant.

No. 98-406-I
Notice of Entry Requested

RECEIVED NOV 01 2002
Dav. Co Chancery Court

FILED 2002 NOV –7 AM 11:23
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

AMENDED ORDER

This Order reflects the ruling made on November 1, 2002 after hearing Defendant's Motion to Alter or Amend the September 18, 2002 Order entered in this matter.

The Plaintiff's motion for summary judgment was heard on September 6, 2002. After hearing the arguments of counsel and reviewing the record, the Court finds the following:

1. The historic zoning overlay and design guidelines for the "Woodlands in Waverly" Historic District that were adopted in 1985 were properly adopted and are valid and enforceable. The Court grants the Defendant's Motion to Amend Complaint, has considered the claims of constitutional

violations, including the Section 1983 counterclaim, and finds that those claims are not meritorious and shall be dismissed.

2. Defendant's house is located in this historic district.

3. The design guidelines prohibit the installation of vinyl siding on houses within the district.

4. The design guidelines were in place when Defendant installed the vinyl siding on her house. Defendant's use of vinyl siding violates these guidelines. The Court must enforce the ordinance, therefore, Plaintiff's motion for summary judgment is supported by the record, is meritorious and is granted.

It is therefore ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment is GRANTED and defendant's counterclaims as amended are DISMISSED.

It is further ORDERED, ADJUDGED and DECREED that an injunction shall be issued requiring that the vinyl siding be removed from the defendant's house and will go into effect thirty days from date of entry of this Order.

ENTERED on this 7th day of November, 2002.

/s/ Irvin H. Kilcrease, Jr.
IRVIN H. KILCREASE
CHANCELLOR

APPROVED FOR ENTRY:

BY PLAINTIFF:

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
KARL F. DEAN, #10419
DIRECTOR OF LAW

/s/ Margaret O. Darby

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/s/ Lora Barkenbus

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BY DEFENDANT:

/s/ Marbut Glenn Gaston, Jr. by JHJ

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Attorney at Law
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/s/ Joseph H. Johnston

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Attorney at Law
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615) 383-2119

[Certification of Service Omitted in Printing]

APPENDIX D

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 SEP –3 PM 2:28
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

Defendant's Response to Plaintiff's Statement of Undisputed Facts In Opposition to Plaintiff's Motion for Summery Judgment

Comes now defendant, Margaret Hudson, and pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, hereby responds to the following facts, to which she contends are in dispute.

1. Historic zoning overlay and design guidelines were adopted for the Woodland in Waverly Historic District in 1985. Affidavit of Tom Walker. Affidavit of Ann Roberts.

RESPONSE: Admitted that the Woodland-in-Waverly Historic Zoning District Guidelines were adopted by the Metropolitan Historic Zoning Commission on

November 25, 1985. However, because these design-guidelines were not adopted *prior* to the creation of this particular Historic Zoning District by the Metropolitan Council, as required by T.C.A. Section 13-7-406, these design guidelines are ***void ab initio***. Council Bill No. 085-1021 passed final reading by the Metropolitan Council on *November 19, 1985.* **[See Affidavit of Margaret Hudson and Exhibits thereto, as well as Exhibits attached to Affidavit of Ann Roberts.]**

2. Margaret Hudson is the owner of the property located at 2208 White Avenue, Nashville, Tennessee. Answer Paragraph 2.

RESPONSE: Admitted that Margaret Hudson is the owner of 2208 White Avenue, Nashville, Tennessee; however, she resides at 1014 Lawrence Avenue, Nashville, Tennessee 37204. This is the address that is listed on the Metropolitan Government taxation records for the said 2208 White Avenue. Margaret Hudson has never resided at 2208 White Avenue. **[See Affidavit of Margaret Hudson, paragraphs 1 and 8.]**

3. Mrs. Hudson's property is within the boundaries of the Historic Zoning Overlay of Woodland in Waverly District and the dwelling thereon is a historic structure in accordance with the Woodland in Waverly Design Guidelines. Affidavit of Tim Walker.

RESPONSE: Admitted that Mrs. Hudson's property is within the boundaries of the Historic Zoning Overlay of Woodland-in-Waverly Historic District, however, the Woodland-in-Waverly Design Guidelines are ***void ab initio*** because they were not adopted by the Metropolitan Historic Zoning Commission until November 25, 1985, six days *after* the Metropolitan Council passed Council Bill No. 085-1021 on final reading on November

19, 1985, and *not prior* to the creation of this particular Historic Zoning District as required by T.C.A. Section 17-7-406. **[See Affidavit of Margaret Hudson and Exhibits thereto, as well as Exhibits to Affidavit of Ann Roberts.]**

4. Margaret Hudson signed a petition directed to the Metropolitan Historic Zoning Commission and the Metropolitan Planning Commission to recommend to the Mayor and the Metropolitan Council to enact historic preservation zoning for the Ridley-Benton neighborhood. Affidavit of Ann Robert.

RESPONSE: Denied. Margaret Hudson did not sign the described petition; neither did her late husband, James T. Hudson sign said petition. The signature of "M/M J.T. Hudson" on this petition is a forgery. **[See Affidavit of Margaret Hudson, paragraph 6 and collective Exhibit "C" attached thereto.]**

5. The Historic Zoning Guidelines for the Woodland in Waverly District, specifically Section II.B. (c) (1) and (4) at page 22 prohibit the installation of vinyl siding on historic structures within the district. Affidavit of Time Walker.

RESPONSE: This document speaks for itself; however, the Historic Zoning Guidelines for the Woodland-in-Waverly District are ***void ab initio*** because they were not adopted prior to the creation of this particular Historic Zoning District as required by T.C.A. Section 13-7-406. Draft Design Guidelines circulated in 1985 did not contain a specific prohibition against vinyl siding (or other sidings) that was included in the final Design Guidelines adopted by the MHZC on November 25, 1985. **[See Correspondence to Don Jones from Ann Roberts dated September 10, 1993, with attachments**

thereto all of which are attached to the Affidavit of Ann Roberts.]

6. Margaret Hudson did not appeal the April 16, 1997 decision of the MHZC to deny a certificate of appropriateness for the vinyl siding. Affidavit of Tim Walker

RESPONSE: Admitted that Margaret Hudson did not appeal the April 16, 1997 decision of the MHZC to deny a Certificate of Appropriateness for vinyl siding; however, this administrative decision is voidable because the Historic Zoning Guidelines for the Woodland-in-Waverly District are ***void ab initio*** since they were not adopted prior to the creation of this particular Historic Zoning District as required by T.C.A. Section 13-7-406. Any action taken pursuant to such guidelines is illegal, ultra vires, and in violation of procedural due process guaranteed under the 14th Amendment to the United States Constitution.

Respectfully submitted,

/s/ Marbut Glenn Gaston, Jr.
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/s/ Joseph H. Johnston
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(615) 383-2119

Attorneys for Defendant Margaret Hudson

[Certification of Service Omitted in Printing]

APPENDIX E

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 SEP –3 PM 2:29
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

Defendant's Statement of Additional Disputed and Undisputed Facts In Opposition to Motion for Summery Judgment

Comes now Defendant, Margaret Hudson, and pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, hereby submits the following Statement of Additional Disputed and Undisputed Facts in Opposition to Plaintiff's Motion for Summary Judgment.

1. The installation of vinyl siding on the house at 2208 White Avenue, Nashville, Tennessee was done in late May or early June of 1996. The work was performed in broad daylight, on weekdays and was thus open and notorious. No complaint about the vinyl siding was ever filed by residents of the Woodland-in-Waverly Historic Zoning District [W-I-W HZD] with the Metropolitan Codes

Department [MCD] or the Metropolitan Historic Zoning Commission [MHZC]. No stop-work Orders were issued by any Metropolitan Agency. The project was completed at a cost of some $7,000.00. **[Affidavit of Margaret Hudson.]**

RESPONSE:

2. Seven months or more after the installation of the vinyl siding on 2208 White Avenue was completed and paid for, Margaret Hudson received Notice that she was in violation of the Historic Zoning District Design Guidelines [HZDDG]. There has been no explanation by the Metropolitan Government to justify this delay that has resulted in an economic hardship to Margaret Hudson. **[Affidavit of Margaret Hudson.]**

RESPONSE:

3. In the Spring of 1998, suit was filed by Plaintiff, Metropolitan Government, to enjoin Margaret Hudson to remove the vinyl siding installed in May/June 1996 and restore her house to its original condition prior to the installation of said siding. **[Complaint, page 3]** More than four years has lapsed since the filing of this lawsuit against Margaret Hudson, which has been subject to involuntary dismissal for lack of prosecution on several occasions. **[Court's Docket-Sheet]** Margaret Hudson has suffered further economic loss by the delay in prosecuting this case because of various costs of compliance due to inflation. **[Affidavit of Margaret Hudson.]**

RESPONSE:

4. The expense of removing the vinyl siding from the house at 2208 White Avenue is an estimate of $3,500.00 to $7,000.00, depending on "codes' requirements. This does not include the repair and/or replacement of the wooden siding that will be damaged or destroyed by removal of the

vinyl siding. The estimated cost of removing the vinyl siding and repairing and/or replacing the wooden siding on this house and restoring it to its original condition is in the range of $18,000.00 to $40,000.00. **[Affidavit of Margaret Hudson. Affidavit of James C. Broome.]**

RESPONSE:

5. Margaret Hudson is 82 years of age and a person of limited means. Compelling her to comply with design guidelines (that are void ab initio) will very likely force her to sell this property that she has owned since 1982. **[Affidavit of Margaret Hudson.]**

RESPONSE:

6. The Woodland-in-Waverly Historic Design Guidelines were adopted by the MHZC on November 25, 2985.[sic] **[Affidavit of Ann Roberts, Minutes of MHZC of 11/25/85.]**

RESPONSE:

7. Council Bill No. 085-1021 that created the Woodland-in-Waverly Historic Zoning District passed final reading by the Metropolitan Council on November 19, 1985. **[Affidavit of Margaret Hudson and Exhibit "G" thereto. Affidavit of Ann Roberts and Exhibits thereto.]**

RESPONSE:

8. Council Bill No. 085-1021 that created the Woodland-in-Waverly Historic Zoning District was signed into law by the Mayor of Metropolitan Government of Nashville and Davidson County on November 25, 1985. **[Affidavit of Margaret Hudson and Exhibit "G" thereto.]**

RESPONSE:

9. Neither Margaret Hudson, nor her husband James T. Hudson {now deceased} ever received actual notice of any meetings, public hearings, or proceedings related to the adoption of the Woodland-in-Waverly Historic Zoning District Design Guidelines adopted by the MHZC on November 25, 1985. **[Affidavit of Margaret Hudson.]**

RESPONSE:

10. Neither Margaret Hudson, nor her husband James T. Hudson {now deceased}, ever signed any petition to support the creation of the Woodland-in-Waverly Historic District, or any other historic district that included the property at 2208 White Avenue. The signature alleged to be that of Margaret Hudson, or even that of James T. Hudson, appearing on any such petition is a forgery. **[Affidavit of Margaret Hudson.]**

RESPONSE:

11. Margaret Hudson's property at 2208 White Avenue is within the "District B" section of the Woodland-in-Waverly Historic Zoning District. 45 houses, or more than 62% of the houses in "District B" of said Historic District, were not considered to be historic structures in 1985. **[Woodland-in-Waverly Historic District Design Guidelines Handbook, page 6.]**

RESPONSE:

12. Only 10 of the 85 houses, or less than 12% of the houses in the "District A" section of the, Woodlands-in-Waverly Historic Zoning District were not considered to be historic structures in 1985. **[Woodland-in-Waverly Historic District Design Guidelines Handbook, page 6.]**

RESPONSE:

13. Of the total of 72 houses in the "District B" Section of the Woodland-in-Waverly Historic Zoning District, 30 are considered post-1970 type brick duplex houses. Of the 42 remaining, 14 have vinyl or aluminum siding, 11 have asbestos shingle siding, and 1 has a mixed brick and shingle siding, all of which are not permitted under Section II. B. © (1) and (4) at page 22 of the Woodland-in-Waverly Historic Zoning District Guidelines Handbook. **[Affidavit of Wilma Settles.]**

RESPONSE:

Respectfully submitted,

/s/ Marbut Glenn Gaston, Jr.

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/s/ Joseph H. Johnston by MGG-JR

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Attorneys for Defendant Margaret Hudson

[Certification of Service Omitted in Printing]

APPENDIX F

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

MARGARET HUDSON,
Defendant.

No. 98-406-I

FILED 2002 SEP –4 PM 2:47
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL DISPUTED AND UNDISPUTED FACTS

Comes now Plaintiff, the Metropolitan Government of Nashville and Davidson County (Metropolitan Government) and files the following Responses to Defendant's Statement of Additional Facts.

1-6. Admitted Solely for the purposes of this summary judgment motion. Plaintiff asserts that these facts are not material to the legal issues in the lawsuit.

7-8. Admitted.

9-13 Admitted solely for the purposes of this summary judgment motion. Plaintiff asserts that these facts are not material to the legal issues in the lawsuit.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
KARL F. DEAN, #10419
DIRECTOR OF LAW

/s/ Margaret O. Darby
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/s/ Lora Barkenbus
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[Certification of Service Omitted in Printing]

APPENDIX G

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 NOV –7 PM 1:08
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

Amended Answer and Counter Complaint

Comes now Defendant Margaret Hudson and, pursuant to Rule 15 of the Tennessee Civil Procedure, respectfully submits this Amended Answer and Counter Complaint:

1. Paragraphs 1 through 13 averred in original Answer are hereby re-averred and are incorporated by reference herein.

2. Paragraphs 1 through 9 of the Affirmative. Defenses averred in the Answer are hereby re-averred and are incorporated by reference herein.

3. In addition to the Affirmative Defenses. previously averred, Defendant avers that the Woodland-in-Waverly Historic Zoning District Ordinance is null and void *ab initio* because it does not comply with

T.C.A. Section 13-7-405 requiring that review guidelines for the historic district be adopted before the creation of an historic zoning district.

4. In addition to the Affirmative Defenses previously averred, Defendant avers that the Design Guidelines for the Woodland-in-Waverly Historic District are null and void *ab initio* because they were not adopted prior to the creation of the Woodland-in-Waverly Historic Zoning District by the Metropolitan Council as required by T.C.A. Section 7-13-406.

5. Paragraphs 1 through 4 averred in Defendants Counter Complaint are hereby re-averred and incorporated by reference herein.

6. In addition to the claims previously averred in the Counter Complaint, Defendant avers that the actions of the Metropolitan Council in passing Council Bill No. 085-1021 that established the Woodland-in-Waverly Historic Zoning District and the actions of the Metropolitan Historic Zoning Commission in adopting Design Guidelines for the Woodland-in-Waverly Historic Zoning District are in violation of T.C.A. Section 13-7-406 and are therefore *ultra vires*.

7. The Woodland-in-Waverly Historic Zoning District and the Design Guidelines for the Historic Zoning District are therefore null and void *ab initio*. The enforcement of any restrictions against Defendant's property at 2208 White Avenue resulting from this historic zoning classification and/or the Design Guidelines constitutes a deprivation of Defendant's civil rights to procedural due process, under color of law, guaranteed under the Due Process Clause of the 14th Amendment of the U.S. Constitution and

gives rise to a cause of action under 42 USC Section 1983.

Prayer for Relief

Wherefore, having fully Answered and Counter Claimed, Defendant prays that the Complaint against her be dismissed with costs and Defendant's Attorney's fees taxed against Plaintiff.

Respectfully submitted,

/s/ Marbut Glenn Gaston, Jr.
Marbut Glenn Gaston, Jr. Esq. (#3143)
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/s/ Joseph H. Johnston
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Attorneys for Defendant Margaret Hudson

APPENDIX H

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2000 DEC 13 PM 1:25
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

ANSWER OF MARGARET HUDSON

Comes now Margaret Hudson and for her Answer would state as follows:

1. She admits the allegations of paragraph 1.
2. She admits the allegations of paragraph 2.
3. The allegations of paragraph 3 do not apply to this Defendant, and if it effects her she neither admits nor denies the allegations but demands strict proof thereof.
4. She denies the allegations of paragraph 4.
5. She denies the allegations of paragraph 5. Furthermore, Exhibits A and B were not attached to the Complaint served on this Defendant.

6. The allegations of paragraph 6 {with reference to The Tennessee Code, the Old Zoning Ordinance, and the New Zoning Ordinance} amount to a statement of law and does not require a response.

7. She denies the allegations of paragraph 7. Furthermore, there were no attachments to the Complaint served on this Defendant.

8. She denies the allegations of paragraph 8.

9. She admits the allegations of the first sentence of paragraph 9. She neither admits nor denies the allegations of the second sentence of paragraph 9 as she has insufficient knowledge in which to respond and demands strict proof thereof. She denies the allegations of the third and last sentence of paragraph 9.

10. She denies the allegations of paragraph 10.

11. She denies the allegations of paragraph 11.

12. The allegations of paragraph 12 {with reference to The Metropolitan Code of Laws, the Old Zoning Ordinance, and the New Zoning Ordinance} amount to a statement of law and does not require a response. She denies the allegations of paragraph 12 that she is subject to injunctive relief.

13. Any allegations not herein specifically admitted or denied are now herein denied.

AFFIRMATIVE DEFENSES

1. Affirmatively, this Defendant would state that the Plaintiff has failed to state a claim or cause of action against this Defendant for the relief being sought.

2. Affirmatively, this Defendant would state that the doctrine of laches and estoppel apply to any relief being sought by the Plaintiff against this Defendant.

3. Affirmatively, the Design Guidelines for the Woodland in Waverly Historic District are void and unenforceable in that they were never adopted and approved by the Metropolitan Council of Nashville and Davidson County, Tennessee.

4. Affirmatively, the Design Guidelines for the Woodland in Waverly Historic District are voidable and unenforceable in that they are unconstitutionally vague.

5. Affirmatively, the Design Guidelines for the Woodland in Waverly Historic District are voidable and unenforceable and unconstitutional in that they have been selectively enforced.

6. Affirmatively, the Zoning Ordinance that provides for the Historic District classification for this Defendant's property is void and unenforceable in that it exceeds and subverts the intent of the legislative body promulgating this Ordinance.

7. Affirmatively, the Zoning Ordinance that provides for the Historic District classification for this Defendant's property has been adopted by the Plaintiff without actual written notice to this Defendant as required by law. The adoption of said Ordinance and the subsequent attempted enforcement thereof against this Defendant's property constitutes a violation of her due process rights guaranteed under Article I, Section 8, of The Tennessee Constitution and the 14th Amendment of The United States Constitution.

8. Affirmatively, the Zoning Ordinance which provides for the Historic District classification for this Defendant's property and the subsequent attempted enforcement thereof against this Defendant's property constitutes an unconstitutional taking without compensation in violation of Article I, Section 21 of The Tennessee Constitution and constitutes the taking of private property for public use without just compensation in violation of the 5th and 14th Amendments of The United States Constitution.

9. Affirmatively, this Defendant's property is not subject to any restrictions under this Historic District Ordinance(s) or Guidelines.

WHEREFORE, DEFENDANT MARGARET HUDSON having fully Answered, prays further that this case be dismissed against her with costs taxed to the Plaintiff

COUNTER-COMPLAINT

Comes now this Defendant, Margaret Hudson, and assuming the position of Counter-Plaintiff against the Counter-Defendant, Metropolitan Government of Nashville and Davidson County, to wit:

1. Counter-Plaintiff is a citizen and resident of Davidson County, Tennessee, and at all times material to this cause, was the owner of real property located at 2208 White Avenue, Nashville, Davidson County, Tennessee.

2. Counter-Defendant, Metropolitan Government of Nashville and Davidson County, Tennessee, is the governmental body with jurisdiction over citizens residing in Davidson County and over real property located within its Political Boundaries Chartered under State law, Counter Defendant.

3. Counter-Plaintiff states that she never received guidelines establishing the restrictive nature of the Historic District in question. The Counter-Defendant, acting under color of law deprived Counter-Plaintiff of her civil rights guaranteed under the 5th and 14th Amendments to The Constitution of the United States and in violation of 42 USC Section 1983; and the actions of the Counter-Defendant amounts to a taking of Counter-Plaintiff's property without just compensation as required by the 14th Amendment of The Constitution of The United States, and Article I, Section 8, of The Tennessee Constitution, and Article I, Section 21, of The Tennessee Constitution.

4. Counter-Plaintiff states that she was never aware that there were restrictions placed on her property that prohibited any restoration or improvement of the exterior of her property, including, but not limited to, vinyl siding. Vinyl siding is the most economical and effective way to maintain the exterior of her property, especially in light of its limited economic value.

WHEREFORE, COUNTER-PLAINTIFF MARGARET HUDSON, prays that this Court:

1. Dismiss the original complaint filed against her; and,

2. Award her damages in the amount of $50,000.00; and,

3. Award her attorneys' fees and costs and expenses pursuant to 42 USC Section 1988; and,

4. Grant her injunctive relief to enjoin Plaintiff from imposing, enforcing, and/or attempting to enforce

any of the guidelines of this Historical District upon her property.

5. And such general relief as the Court deems proper.

Respectfully submitted,

/s/ Marbut G. Gaston Jr.
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Attorney for Margaret Hudson
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[Certification of Service Omitted in Printing]

APPENDIX I

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants.

No. 98-406-I

FILED 2001 JAN 18 PM 3:59
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

ANSWER TO COUNTER-COMPLAINT OF MARGARET HUDSON

Comes now The Metropolitan Government of Nashville and Davidson County and answers the Counter Complaint filed against it by defendant Margaret Hudson:

1. Admitted.
2. Admitted.
3. Denied.
4. Denied.

Any and all allegations contained in Counter-Plaintiff Margaret Hudson's Counter-Complaint not heretofore admitted or denied, are hereby denied the same as if specifically done.

Now having fully answered the Counter-Complaint filed by Margaret Hudson, Counter-Defendant Metropolitan Government prays that said Counter-Complaint be dismissed, that the prayer for damages set forth therein be denied, and that all costs of this cause be taxed to the Counter-Plaintiff Hudson.

Respectfully submitted,

/s/David Diaz-Barriga
David Diaz-Barriga, #17951
Metropolitan Attorney

/s/ Lora A. Barkenbus
Lora A. Barkenbus, #17243
Metropolitan Attorney
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Nashville, TN 37201
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APPENDIX J

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

MARGARET HUDSON
Defendant.

No. 98-406-I

FILED 2002 JUN 19 PM 12:14
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

MOTION FOR SUMMARY JUDGMENT

COMES now defendant, Metropolitan Government of Nashville and Davidson County, (hereinafter "Metropolitan Government"), and pursuant to Rule 56 of the Tennessee Rules of Civil Procedure hereby moves this Court to grant summary judgment in its favor. For grounds, the Metropolitan Government will show that there are no disputed material facts and judgment should be awarded to the Metropolitan Government as a matter of law.

In support of this motion, plaintiff files the attached memorandum of law, statement of undisputed facts, and affidavits of Tim Walker and Ann Roberts with attachments.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
KARL F. DEAN, #10419
DIRECTOR OF LAW

/s/ Margaret O. Darby
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[Certification of Service Omitted in Printing]

APPENDIX K

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 OCT 11 PM 1:03
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

Defendant's Motion To Alter or Amend The Summary Judgment Order

COMES now defendant, Margaret Hudson and, pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, hereby respectfully moves the Court for an Order to Alter or Amend the Summary Judgment Order entered in favor of Plaintiff, Metropolitan Government, on September 18, 2002.

Grounds for this Motion are as follows:

1. Defendant moved to file an Amended Complaint prior to its argument on the Summary Judgment in which she challenged the constitutionality of the Woodland in Waverly Historic Zoning District on the grounds that ir had not been properly enacted in compliance

with the enabling statute, Tennessee Code Annotated, Section 13-7-406; and, therefore was in violation of the Due Process Clause of the 14th Amendment.

2. Plaintiff's Counsel, in open court, stated there was no opposition to the Motion to Amend and that the Motion for Summary Judgment could proceed based on the pleadings as amended.

3. The Order entered on September 18, 2002, which granted Plaintiff's Motion for Summary Judgment did not specifically address Defendant's Counterclaims.

4. Defendant wishes to appeal the Summary Judgment based upon her constitutional defenses and counterclaims. However, in order to raise these issues on appeal, they must be addressed by the Trial Court and disposed of in its final Order.

Wherefore, premises considered, Defendant prays that her Motion to Alter or Amend be granted and that the Court specifically address her constitutional defenses and counterclaims in its final Order.

Respectfully submitted,

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(615) 385-2804

/s/ Joseph H. Johnston
Joseph H. Johnston, (#4706)
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(615) 383-2119

Attorneys for Defendant Margaret Hudson

[Certification of Service Omitted in Printing]

THIS MOTION IS EXPECTED TO BE HEARD ON **FRIDAY, NOVEMBER 1, 2002, AT 9:00 A.M.** OR AS SOON THEREAFTER AS POSSIBLE. FAILURE TO FILE A TIMELY WRITTEN RESPONSE TO THIS MOTION MAY RESULT IN THE SAME BEING GRANTED WITHOUT FURTHER HEARING BY THE COURT.

APPENDIX L

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 NOV 14 PM 2:51
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

NOTICE OF APPEAL

Comes now defendant, Margaret Hudson, and pursuant to Rules 4 and 5 of the Tennessee Rules of Appellate Procedure, hereby gives Notice of Appeal from the Final Order entered in this cause on November 7, 2002, granting Summary Judgment in favor of Plaintiff Metropolitan Government; dismissing her federal counterclaims, including claims brought pursuant to 42 USC § 1983; and, Ordering that Defendant remove vinyl siding from her home found to be in violation of the guidelines for the Woodland in Waverly Historic Zoning District.

Respectfully submitted,

/s/ Joseph H. Johnston
Joseph H. Johnston, (#4706)
P.O. Box 120874
Nashville. TN 37212
(615) 383-2119

/s/ Marbut Glenn Gaston, Jr.
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Attorneys for Defendant

[Certification of Service Omitted in Printing]

APPENDIX M

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,
Plaintiff,

vs.

MARGARET HUDSON AND HAROLD CAPITEL, D/B/A SOUTHERN ALUMINUM COMPANY,
Defendants,

No. 98-406-I

FILED 2002 SEP -3 PM 2:29
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

AFFIDAVIT of MARGARET HUDSON

In Opposition to Motion for Summary Judgment

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Margaret Hudson, having first been duly sworn, deposes and says:

1. I was born November 26, 1920. I was married to James T. Hudson for over 50-years {before his death on February 26, 1998}, and we had 8-children {one of whom is a mentally-challenged adult who still lives with me and another adult child lives with me who has a terminal illness}, and several grandchildren and great-grandchildren. Mr. Hudson worked for the L&N Railroad

until he retired in the early 1980's. I worked for Ruth Randolph from 1956 until 2001. I have lived at 1014 Lawrence Avenue since 1966, and my home is about is about 15-blocks west of 2208 White Avenue property, which is the subject of this lawsuit.

2. My her late husband and I purchased the 2208 White Avenue property June 17, 1982, for $14,770.00, with Ruth Randolph acting our real estate agent. I asked Mrs. Randolph to help my husband and me invest our savings, and Mrs. Randolph financed the purchase money balance for us on this property. We bought this home as an investment, and have invested considerable sums in renovations to it, not only at its purchase but over the years as well. However, we did not rent it. We allowed one of our adult daughte.s, Wilma Settles, to live there. Appreciation in value to provide retirement income was our investment objective.

3. I am now advised by my lawyer that in 1980, the Woodland-in-Waverly National Register Historic District {hereinafter "District-A"} was established. It consisted of 92-properties, located on Roycroft Place, Benton Avenue, Ridley Boulevard, Grantland Avenue, and 9-homes on the north end of White Avenue. The area was bounded in general by Wedgewood Avenue to the north, by Franklin Pike to the West, by Bradford Avenue to the south, and by the remaining homes on White Avenue and those on Lindell Avenue, with I-65, to the east {hereinafter "District-B"}. **See National Register Map on page 5, Woodland-in-Waverly Handbook and Design Guideline, Exhibit "C" to Plaintiff's original Complaint, and attached as Exhibit "A".** In 1980, 2208 White Avenue, the property subject to this lawsuit, was not a part of this Historic Register District.

4. Since the filing of this lawsuit against me, I have learned that the Woodland-in-Waverly Historic District was created in 1985. Basically, the 72-homes in "District B" were included with the 85 homes in "District A" homes {the earlier 92-National Register properties reduced by 7-parcels when the Historic District was formed} to form this Historic District. However, in "District B" only 27-homes [or 38%] are historic and 45-homes [or 62%) are non-historic; where as, in "District A" 75-homes [or 88%] are historic and only 10-homes [12%] are non-historic. **See District Map on page 6, Woodland-in-Waverly Handbook and Design Guideline, Exhibit "C" to Plaintiff's original Complaint, highlighted for ease of identification and sectioned to indicate original Historic Register District {District "A" as noted herein} and attached to Exhibit "B".** According to my lawyer, this disparity in 'historic' to 'non-historic' ratios within the two areas suggests that the annexation of "District B" was merely an effort to create a buffer between the "District A" homes and I-65 by using {and restricting, limiting, and encumbering} those homes in "District B", including my property at 2208 White Avenue.

5. A detailed examination of tax appraised values, and more specifically, real estate sales comparables, provided by my lawyer, reveals an even more alarming disparity between the home values of these two 'areas', and evidence to support the theory that "District B" was created as a buffer for the more valuable properties in "District A".

Values compiled by my lawyer, Marbut Glenn Gaston, Jr., in 1999 are as follows:

1985 Added Area "District B"		1980 Historic Register "District A"	Variance
	1999 Tax Appraised Value {average}		
$70,080	*Historic Homes*	$99,068	+140%
$72,910	Non-Historic Homes	$74,380	negligible
	1999 Specific Sales {High-Low average}		
$52,400 [$71,000 & $34,600]	*Historic Homes*	$187,080 [$350,000 & $99,000]	+357%
$56,527	All Home Sales	$173,658	+307%
$57,577	Non-Historic Homes	$59,500	negligible

50a

	1985 Tax Appraised Value {High-Low average}		
$25,981 [$36,500 & 15,100]	All Homes	$35,945 [$105,000 & 15,700]	+138%
	1985-1986 Sales Transactions {High-Low average}		
$29,958	All Home Sales	$51,880	+173%
[$39,916 & $20,000]	Sales Price	[$59,500 & $41,200]	
[$33,100 & $28,000]	Metro Tax Appraised Value	[$23,100 & $29,400]	

51a

6. Contrary to paragraph 6 of Ann Roberts Affidavit, I never signed a petition in favor of creating an historic district. I have seen a petition with the name "M/M J.T. Hudson" on it, but that is definitely not my husband's signature either. My husband did not sign his name with only his initials {"J.T."} but always first name and middle initial {"James T."}. I have attached a copy of the applicable signature page from this petition together with a copy of my husband's notarized signature on the front page of our purchase deed for the Court to review. **See both attached as collective Exhibit "C" hereto.**

7. My husband and I never received any mailings from Metro Government, or anyone else, with specifics about the formation of a Historic District at this property, or the adoption of Historic Zoning District Design Guidelines. Further, we never received any information about the restrictions and/or guidelines that would apply to our property. Only after I received notice of the violation of Design Guidelines was I provided a copy of the Historic District Design Guidelines. My husband and I would never have supported such costly and restrictive improvement measures in 1985 or today either.

8. My husband and I never attended any meetings regarding the formation of this Historic District, nor did we receive any mailings about such meetings. The mailing address for 2208 White Avenue with the Metro Property Assessor and Metro Trustee for the payment of taxes is clearly listed as 1014 Lawrence Avenue, Nashville, TN 37204 and not this property address.

9. I never received any Woodland-in-Waverly Newsletters, or any information about a neighborhood association, or any meetings of the same, until after this issue of non-compliance came up in 1997. I never saw a Historic

District sign on White Avenue, until after this issue of non-compliance came up in 1997.

10. During the past 20-years, I have done repeated maintenance to the home, including re-roofing and painting the exterior at least twice. In fact, the cost of repeated re-painting of wood siding was the primary factor in my decision to install the vinyl siding on this house. Nothing in my management of this property, or contact with persons in the neighborhood, led me to believe I was restricted or prohibited in any manner whatsoever in the way I took care of this house.

11. In summary, I had absolutely no idea that my house at 2208 White Avenue was in fact a restricted-historic-home within this "Historic District", and I would never have supported any zoning change for this "Historic District" had I known the restrictions and prohibitions being placed on a $14,770.00 home.

12. In late May or early June of 1996, I hired Mr. Harold Capitel, d/b/a Southern Aluminum Company, to install siding on this home, at a cost of $7,000.00. His company was doing siding jobs on various homes in my Lawrence Avenue neighborhood, and I asked him to give me a bid on installing vinyl siding on 2208 White Avenue. The improvement cost was almost 15% of the home's Metro Tax Appraised value at that time of $45,200. I did not know a permit was needed for this work since I was not a contractor. I never had to get a permit when I had the house painted several times before. I simply thought I had made a reasonable maintenance-free investment improvement to a house I had owned for almost 15-years, at a time when I was nearing retirement and a time when I was in failing health. I was concerned about my investment and its maximum opportunity to provide income to me in my declining years.

13. The job took several days, and while I am not exactly sure how long, it could have been at least a week. At no time during this EXTERIOR construction project did anyone inquire about the siding installation.. No neighbors called me; none of the Woodland-in-Waverly Neighborhood Association members called me; and no Codes or Zoning officials called me. I paid my money for a job I thought was well done, and I gave it no further thought other than of an investment well made.

14. In late December of 1996 or early January of 1997, *seven months after this vinyl siding had been installed*, I was notified to appear before the Metro Historic Zoning Commission to answer its complaint against me for installing siding on this house.

15. To suggest that no one noticed the installation of this vinyl siding at 2208 White Avenue would be preposterous. The fact is, people in the neighborhood noticed what was going on, and didn't think anything about it. It made the neighborhood look better. In fact, the then President of the Woodlands-in-Waverly Association, Christopher Cantanzaro, said, "it really is one of the better looking properties on the block now." **See TENNESSEAN article, Sunday, February 16, 1997, attached hereto as Exhibit "D"**. I know there are other houses on White Avenue and Lindell Avenue that have siding installed on them. In fact, subsequent to this incident, a house at 2223 Lindell Avenue had a portion of siding installed on the side of the house before that work was stopped in process. **See photograph attached as Exhibit "E".** However, the vinyl siding on that property was never removed. The siding on my house at 2208 White Avenue is complete in every detail. **See photographs attached Exhibit "F".**

16. The delay in filing the Complaint against me has been compounded by the fact that more than 5-years have

lapsed with the Complaint being dismissed for failure to prosecute on several different occasions. The cost of compliance has increased dramatically because of inflation over the period of time, which compounds the economic hardship on me. According to the Affidavit of James C. Broome, a general contractor, the cost of removing the vinyl and restoring the wood underneath the vinyl could range from $18,000.00 to $40,000.00. This is on a house that my husband and I only paid $14,770.83 to acquire.

17. Without actual written notice that my house was to be subject to these restrictions after the Historic District had been created by the Metro Council, it is fundamentally unfair to apply these standards long after the work has been done and I have spent my $7,000.00. According to the Historic District Map, my house is surrounded on all sides by non-historic buildings. In fact, according to the Affidavit of Wilma Settles, my daughter, there are 9 other houses on my street, White Avenue, with vinyl or aluminum siding on them.

18. I have been advise by my lawyer that the restrictive guidelines that were promulgated pursuant to this Zoning Ordinance, were never adopted by the Metropolitan Historic Zoning Commission prior to the creation of the Woodland-in-Waverly Historic District by the Metropolitan Council, as required under State Law, TCA Section 13-7-406. Contrary to the Affidavit of Ann Roberts, the Council Bill No. 085-1021 was passed by the Metropolitan Council on Third Reading on November 19, 1995. The Council never saw these Design Guidelines because they were not adopted by the Metropolitan Historic Zoning Commission until after that date; on November 25, 1985. The Mayor signed this bill on November 25, 1985. **See copy of Ordinance No. 085-1021 and Minutes of November 25, 1985 meeting of MHZC attached hereto as Collective Exhibit "G".**

19. According to the Woodland-in-Waverly Historic Zoning Overlay Map, there are 72 houses in "District B", the district added to the original Historic Register area. Of these, 28 are designated historic. According to the Affidavit of my daughter, Wilma Settles, 22 of these 28 'historic' houses have siding. Of the 44 'non-historic' houses, 30 are post-1970 type brick duplex houses, and of the remaining 14 'non-historic' houses, 4 of those have siding.

FURTHER AFFIANT SAITH NOT. Witness my hand on September 3, 2002.

/s/ Margaret Hudson
Margaret Hudson

Sworn to and subscribed before me on September 3, 2002.

/s/ Ray Randolph
Notary Public

My commission expires: *10/25/03*

[EXHIBITS OMITTED IN PRINTING]

(2)

Supreme Court, U.S.
FILED
NOV 22 2004
OFFICE OF THE CLERK

No. 04-405

IN THE

Supreme Court of the United States

MARGARET HUDSON,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

BRIEF IN OPPOSITION

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JOHN L. KENNEDY*
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STATEMENT OF TENNESSEE PROCEEDINGS[1]

This action arose out of Petitioner's installation of vinyl siding on an investment property that she owned within a historic preservation district. The guidelines for the historic preservation district prohibit the installation of vinyl siding onto the houses within that historic district. Petitioner acknowledges that her investment property is located within the district and that she violated the zoning overlay by installing vinyl siding.

Petitioner's house is located at 2208 White Avenue Nashville, Tennessee, within the Woodland in Waverly Historic Zoning District (hereinafter the "Historic District"). (R. 183). It is an investment property for her. (R. 80-1).

The Metropolitan Council adopted the Historic District in 1985 (hereinafter the "1985 Ordinance").

The following measures were taken to notify and hear the public before the Woodland in Waverly Historic District and guidelines were adopted:

- May 1983 Metropolitan Historical Commission Director Shain Dennison spoke at a public meeting in the neighborhood.

1. Petitioner Margaret Hudson will be referred to as "Petitioner." The Metropolitan Government of Nashville and Davidson County will be referred to as the "Metropolitan Government." The Tennessee Court of Appeals will be referred to as the "Tennessee Court of Appeals" or "Court of Appeals." The Petition for a Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred as (Petition, Appendix __, __). Citations to items not so included in the Petition, will be made to the Record on file with the Clerk of the Tennessee Supreme Court and designated as (R. __).

- May 1983, the Metropolitan Historic Zoning Commission (MHZC) mailed an information packet on historic zoning to all residents and owners in proposed district, including draft guidelines, explanation of historic zoning, etc., asking for input. The mailing announced a June 13, 1985 public hearing on the proposed zoning.

- On June 13, 1985 a public hearing was held to discuss the proposed historic district.

- The recommendation of the MHZC that the neighborhood be designated a historic district took place in a public meeting of the MHZC on June 27, 1985.

- On August 14, 1995, the Metropolitan Planning Commission approved the designation.

- The Metropolitan Council held a duly advertised public hearing on the historic designation of the Woodland in Waverly district on November 5, 1985.

- The guidelines for the district were adopted in a public meeting of the MHZC on November 25, 1985.

- Public notice of the district ran in the local daily newspaper, "The Tennessean," on November 27, 1985.

(R. 128-130).

In addition, notices that the neighborhood had been designated a historic preservation district were distributed by the Woodland in Waverly Neighborhood Association in December 1985, after the district was adopted. (R.129). These notices described the procedure for how to apply for a certificate of appropriateness before changing the exterior of a house in this neighborhood. (R. 129).

The Mayor signed the ordinance on November 25, 1985, and pursuant to its terms, it took effect five days later on November 30, 1985. (Supp. R. 3, 11).

The Historic District has specific design guidelines relating to modifications of historic structures in the overlay district. (R. 183-4). Sections II.B(6)(c)(1) and (4) prohibit the installation of vinyl siding on structures within the district. (Petition, Appendix D, 20a).

Petitioner failed to obtain a certificate of appropriateness prior to modifying the exterior of the house by installing vinyl siding in 1996. (R. 84, 183).

After the siding was installed, Petitioner applied to the staff of the MHZC for a certificate of appropriateness. The staff denied the application. (R. 183). Petitioner then appealed the staff's decision to the MHZC. The MHZC denied the appeal on April 16, 1997. (R. 184). Petitioner did not appeal the denial of the MHZC. (Petition, Appendix D, 21a).

Petitioner has not removed the vinyl siding, even though a certificate of appropriateness was never granted. (R. 184).

The Metropolitan Government filed suit to enforce the design guidelines on February 10, 1998. (R. 1-4). Petitioner did not attack the alleged procedural irregularities in the adoption of this Historic District until she filed her Answer in 2000, 15 years after adoption of the overlay. (R. 52-54).

The Metropolitan Government filed a Motion for Summary Judgment on June 19, 2002. (R. 60-62). The Trial Court granted summary judgment on November 7, 2002. (Petition, Appendix C, 15a-16a).

Petitioner appealed the grant of summary judgment on November 14, 2002. (R. 217-218). The Court of Appeals ruled, in a per curiam opinion, in favor of the Metropolitan Government on December 30, 2003. (Petition, Appendix B, 2a).

The Court of Appeals determined that even if there was insufficient notice to Petitioner of the adoption of the historic preservation overlay, Petitioner's decision to wait 15 years to challenge the adoption immunized it from a procedural attack. (Petition, Appendix B, 9a-10a).

The Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal from the decision of the Court of Appeals. (Petition, Appendix A, 1a).

SUMMARY OF ARGUMENT

The Metropolitan Government did not deny Petitioner procedural due process of law under the Fourteenth Amendment for the following reasons:

- Petitioner's case falls within the framework of the *Bi-Metallic* analysis and not the *Londoner* rule.

- In passing the 1985 Ordinance, the Metropolitan Government acted in a legislative manner to increase the size of the Historic District by 72 properties, bringing its size toe 157 parcels. Petitioner was not singled out in any fashion.

- The 1985 Ordinance was not directed at a few individuals.

- Petitioner was not exceptionally affected by the 1985 Ordinance. She was not threatened with the imminent loss of the property or of her rights to the property. Her continued use of the property was not changed by the 1985 Ordinance.

Therefore, Petitioner did suffer a deprivation cognizable under the Due Process Clause.

The Tennessee rule of repose applicable to challenges to zoning ordinances on procedural grounds as applied by the decision of the Tennessee Court of Appeals does not violate the Supremacy Clause of the United States Constitution. In enacting the statute that became 42 U.S.C. § 1983, Congress omitted any language of limitation or repose. Therefore, the ruling of the Tennessee Court of Appeals is

not contrary to any provision of 42 U.S.C. § 1983. Moreover, the use of a reasonable state statue of limitation or rule of repose to limit a cause of action brought under 42 U.S.C. § 1983 is fully consistent with federal policy. *Wilson v. Garcia,* 471 U.S. 261, 271 (1985).

The violations of state laws requiring notice over and above the publication of the 1985 Ordinance as found by the decision of the Tennessee Court of Appeals were random and unauthorized acts so a pre-termination hearing was impractical. As such, they were not acts that deprived Petitioner of any right under procedural due process so long as Tennessee law provides an adequate post termination remedy. *Hudson v. Palmer,* 468 U.S. 517, 532-33 (1984). Tennessee law provided such remedies in the form of the right to appeal from the denial of the variance by the Historic Zoning Commission and by inverse condemnation if Petitioner wished to claim a regulatory taking of her property.

REASONS FOR DENYING THE PETITION

A. Petitioner was not Denied Procedural Due Process of Law under the Fourteenth Amendment.

Petitioner asserts a procedural due process claim under the Fourteenth Amendment due to procedural flaws in the adoption of the 1985 Ordinance. Petitioner bases her claim on the Metropolitan Government's failure to provide her with individual notice of a public hearing held prior to the Metropolitan Council's adoption of the 1985 Ordinance and on the failure to publicize the guidelines prior to its consideration by the Metropolitan Council. For purposes of summary judgment only, the Metropolitan Government conceded the issue of individual notice even though there is

still a contested issue of fact as to whether Petitioner or her late husband signed a petition in favor of the expansion of the Historic District. (Petition, Appendix D, 20a).

The Tennessee Court of Appeals found that the Metropolitan Government failed in two respects to provide Petitioner with the individual notice required by M.C.L. § 17.40.710 prior to the adoption of the 1985 Ordinance. (Petition, Appendix B, 9a). First, the Metropolitan Government mailed the notice of the hearing on the guidelines to the address of Petitioner's property in the proposed expanded Historic District, but not to her actual residence that was outside that district. The Tennessee Court of Appeals found that the address of Petitioner's residence was available to the Metropolitan Government in its property tax records. (*Id.*). The second failure noted by the Tennessee Court of Appeals was that the Metropolitan Government did not mail the notice of the hearing in a timely fashion so that it would arrive 21 days prior to the date of the public hearing, as also required by M.C.L. § 17.40.710. (*Id.*). Therefore, the Tennessee Court of Appeals found that the Metropolitan Government violated the notice requirements established by local ordinance and, by implication, the requirement for reasonable notice imposed by T.C.A. § 13-7-406. (Petition, Appendix B, 8a-9a). The Tennessee Court of Appeals noted Petitioner's claim regarding the tardy publication of the guidelines, but made no finding other than to assume it was true for the sake of argument. (Petition, Appendix B, 10a). There was no contested issue regarding the adequacy of the notice to the public at large prior to the adoption of the 1985 Ordinance. Likewise, the Tennessee Court of Appeals made no findings regarding the Due Process Clause of the Fourteenth Amendment, so the only violations it found were restricted to Tennessee law.

By this time it is well settled that a violation of a state procedural regulation or statute by itself does not necessarily constitute a violation of the guarantee of procedural due process conveyed by the Fourteenth Amendment. *Engle v. Isaac,* 456 U.S. 107, 119-121 (1982). Otherwise, a state would fall under a federal due process obligation to follow all of its procedures thus creating an unmanageable situation for the federal courts. *Purisch v. Tennessee Tech. Univ.,* 76 F. 3d 1414, 1423 (6th Cir. 1995), *quoting Levine V. Torvik,* 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied,* 509 U.S. 907 (1993). This principle of law applies equally to matters involving real property rights. *Brody v. City of Mason,* 250 F.3d 432, 438 (6th Cir. 2001). Therefore, Petitioner has to demonstrate that the violations of which she complains rise to a level that implicates the Fourteenth Amendment in addition to Tennessee law.

There is no dispute that the issues of proper notification to Petitioner arose in the context of legislation that increased the size of the existing Historic District by 72 properties to reach a total of 157 properties in all. Generally speaking, the procedural arm of the Due Process Clause of the Fourteenth amendment does not apply to adoption of a statute that affects more than a "few people." *Bi-Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1914). An exception to this general principal arises when an ordinance places an exceptional burden on a relatively small number of people. *Londoner v. Denver,* 210 U.S. 373, 385 (1908). Neither of these decisions offered a precise definition of the terms "few people" or relatively small number of people so that task has been left to courts in succeeding cases. Speaking for the Seventh Circuit, Judge Posner has described the more recent analytical framework in zoning cases to the effect that due process does not apply "when zoning decisions are

confined to a legislative body rather than a judicial body." *Indiana Land Company, LLC v. City of Greenwood,* 378 F.3d 705, 710 (7th Cir. 2004). The rationale being that legislative action is generally broader in scope than a proceeding that is targeted on a specific individual. (*Id.*). In an earlier decision, the Seventh Circuit applied the legislative-judicial analysis to affirm dismissal in a case where the legislative bill was prophylactic in nature and arguably aimed at preventing single proposed development and in the face of a claim of state law violation. *Pro Eco, Inc. v. Bd. of Commissioners of Jay County, Indiana,* 57 F.3d 505, 513 (7th Cir. 1995). In both of these cases, the Seventh Circuit relied on the analysis in *City of Eastlake v. Forest City Enterprises,* 426 U.S. 668, 672-677 (1976). In *Eastlake,* the Court considered an unusual situation in which the grant of a zoning variance to a single entity was subject to approval by the town's citizens by referendum and found that even though the referendum disapproved the variance, the Due Process Clause was not implicated. The Sixth Circuit follows a similar analytical process. *Brody v. City of Mason, Id.* 250 F.3d 437-38.

In an effort to meet the "small number of people" prong of the *Londoner* analysis, Petitioner cites the decision from the Ninth Circuit Court of Appeals that applied due process requirements to zoning legislation. *Harris v. County of Riverside*, 904 F.2d. 497, 501-502 (9th Cir. 1990). However, the facts in *Harris* were quite unique. The challenged legislation was actually an amendment to a pending zoning ordinance that affected plaintiff and one other landowner who actually requested the amendment. (*Id.*). Further, the amendment effectively eliminated the commercial use that plaintiff made of his land. (*Id.*). It was no surprise then that the Court found that the amendment to the zoning ordinance

singled out the plaintiff and exceptionally affected his property interest on an individual basis. (*Id.*). Therefore, the Court found that although the original version of the ordinance was duly published, there was virtually no notice of the amendment, much less the individual, actual notice that the Court believed was required by the Due Process Clause under the *Londoner* analysis. *Harris v. County of Riverside,* 904 F.2d 503-504. Needless to say, the undisputed facts in the instant case are far different than those in *Harris.* Although Petitioner complains of the timing of the adoption of the administrative guidelines, there is no dispute that the Metropolitan Government published the 1985 Ordinance. Moreover, Petitioner's property was one of 72 parcels added to the Historic District, so she was not specifically targeted.

More recent decisions from the Ninth Circuit show that its reasoning process is close to that employed by the Seventh and Sixth Circuits. In *Halverson v. Skagit County,* 42 F.3d 1257, 1258, 1260-61 (9th Cir. 1995), the facts are more analogous to the instant case in that ninety residents sued the county claiming that its system of levees and dikes caused increased flooding to their homes. One of their causes of action was that the county violated the procedural arm of the Due Process Clause by failing to provide them individual notice of the legislative acts that established the system of levee's and dikes. (*Id.*). The Court upheld a summary judgment dismissing that claim stating that the character of the county's action was legislative in nature in that it involved land use covering a sizable area and was not targeted to one or a few individuals. (*Id.*) Thus, it did not give rise to due process considerations. (*Id.*). *See also Hotel & Motel Association of Oakland v. City of Oakland,* 344 F.3d 959, 968-70 (9th Cir. 2003). Therefore, the Ninth Circuit's analytical framework for determining whether to analyze a

case under the *Bi-Metallic* or *Londoner* rulings is not markedly different from that used by the Sixth and Seventh Circuits.

In order to meet the "exceptionally affected" prong of *Londoner*, Petitioner relies on a line of cases beginning with *Mullane v. Central Havover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and culminating with *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 797-799 (1983). However, a careful reading of those cases demonstrates that they do not apply to her situation or support her argument. As the Court explained in *Mennonite*, a common thread in the precedents that it examined is that the owners of the property interests were faced with an immediate and drastic effect to their property due to the initiation of a specific proceeding. *Mennonite Board of Missions v. Adams,* 462 U.S. 795-798. Whether it be by court action to settle a trust account, initiation of condemnation actions, or as in *Mennonite* itself, a sale of property for back taxes that directly threatened the mortgagee's interest, the process potentially eliminated the property interests of the various plaintiffs. (*Id.*). Therefore, the Court determined that notice *in rem* was an insufficient guarantee of due process as not reasonably calculated to apprise the owner of the property interest of its peril, particularly in view of the fact that the addresses of the plaintiff in each case was reasonably available in public documents. *Mennonite Board of Missions v. Adams,* 462 U.S. 798-99.

The impact of that common thread of immediate and drastic impact was demonstrated in a decision by the Eleventh Circuit that also addressed the interests of a mortgagee who was apparently also the property owner. *Zipperer v. City of Fort Myers,* 41 F.3d 619, 623-24 (11th Cir. 1995), *certiorari*

denied, 516 U.S. 807 (1995). The municipal action in *Zipperer* consisted of a special assessment for property improvements that resulted in a tax lien that subordinated the mortgagee's lien. (*Id.*). After closely examining *Mennonite*, the Court reasoned that, although the plaintiff had a constitutionally protected property right, due process did not require actual notice because the plaintiff did not face an immediate and drastic threat to his property interest. (*Id.*). Instead, as the landowner, he retained his significant ownership interest as well as the reduced priority of his lien, albeit at a higher cost. (*Id.*). In reaching its decision, the Court relied on a similar analysis in a case from the Fifth Circuit, *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 614 (5th Cir. 1991). (*Id.*). Likewise, Petitioner in the instant case may face higher costs to maintain her property as a result of the 1985 Ordinance, but she cannot demonstrate that she was thereby subject to an immediate and drastic effect such as the complete loss of her property interest. Just as the plaintiff in *Zipperer*, she retained the ownership of her property upon the enactment of the 1985 Ordinance. Therefore, Petitioner cannot satisfy the "exceptional burden" requirement of the *Londoner* rule. Moreover, the ruling in *Mennonite Board of Missions v. Adams* does not require actual notice to Petitioner in order to satisfy the procedural arm of the Due Process Clause. The publication of the pendent 1985 Ordinance that the Metropolitan Government unquestionably provided was sufficient.

Throughout her arguments on due process, Petitioner appears to assume that the Due Process Clause applies to her due solely to her ownership of her property. However, as the Court clearly stated in *Mennonite*, it is the degree of threat to that ownership interest that triggers the protection of the procedural branch of the Due Process Clause. Simply put,

Petitioner has not suffered a deprivation of her property interest sufficient to invoke the Due Process Clause. Petitioner attempts to demonstrate such a deprivation by inferring that historic zoning districts impose such restrictions that they border on confiscatory measures. Suffice it to say that Petitioner has not presented facts to show that the 1985 Ordinance even approaches that level of restrictions. This Court has long recognized that all zoning interfere with an owner's use of property, but that alone is insufficient to invalidate a zoning ordinance. *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 673, n.8 (1976).

B. The Rule of Repose Invoked by the Tennessee Court of Appeals does not implicate the Supremacy Clause.

The Metropolitan Government, of course, does not dispute Petitioner's claim that the United States Constitution is the law of the land and through the Supremacy Clause, prevails over contrary state law. However, the decision of the Tennessee Court of Appeals did not fly in the face of the Supremacy Clause.

This Court has stated that its analysis of the application of the Supremacy Clause, "start[s] with the assumption that the historic police powers of the states [are] not to be superceded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unless Congress explicitly states its intent to pre-empt all state laws on a particular subject, state law is only pre-empted to the extent it actually conflicts with federal law. *Pacific Gas & Elect. Co. v. State Energy Resources Conservator & Development Comm'n.*, 461 U.S. 190, 204 (1983).

Petitioner poses her argument as if any state action to limit a claim brought under 42 U.S.C. § 1983 for violation of procedural due process frustrates the Congressional purpose in its adoption and thus, violates the Supremacy Clause. That simply is not the law. In reaching its holding that state statutes of limitation for personal injury actions should apply to claims brought under 42 U.S.C. § 1983, the Court observed that, "A federal clause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), *citing Adams v. Woods*, 2 Cranch 336, 342 (1805). In a frequently quoted passage, this Court described the basis for its decision to apply a state statute of limitation for personal injury claims to claims under 42 U.S.C. § 1981 as follows:

> Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of state ones.... In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1976).

The Court also stated that federal court should not show any "special reluctance" to apply state law. (*Id.*).

As Petitioner asserts, the Metropolitan Government did not plead the statute of limitations; however, as this Court

has stated, the general purposes and principles of all statutes of repose are the same. *Goodman v. Lukens Steel Company, et al.*, 482 U.S. 656, 664-65 (1987).

The ruling of the Tennessee Court of Appeals amounts to nothing more than a statute of repose. That Court found that public policy dictates that after a long period of acceptance, of at least ten years, that there can be no challenge to a law based on any alleged procedural flaw in its adoption. (Petition, Appendix B, 9a-10a). In reaching that conclusion, the Court relied on precedents in Tennessee and at least four other states. The logic and rationale underlying that decision is precisely the same as that which underlies the decisions in *Wilson v. Garcia*; *Johnson v. Railway Express Agency, Inc.*; and *Goodman v. Lukens Steel Company, et al.*, as quoted above. Thus, its decision is not inconsistent with federal law.

Petitioner cites the Tenth Circuit case of *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985) for the proposition that a zoning ordinance that does not comply with state procedural notice requirement is void and subject to attack at any time. It was a diversity case that apparently relied on Utah law. (*Id.*, 773 F.2d 252). However, five years later the Tenth Circuit upheld another challenge to a zoning ordinance from Utah where plaintiffs could have known about the ordinance for 17 years through publication and actually knew of it for nine years before filing suit challenging the procedure used in its adoption. *Thatcher Enterprises v. Cache County Corporation, et al.*, 902 F.2d 1472, 1475-76 (10th Cir. 1990). The *Thatcher* court distinguished its earlier ruling in *Carter v. City of Salina* because that the plaintiffs in that case lived outside of Utah and could not possibly receive notice by publication of the ordinance. In reaching its decision in *Thatcher*, the Court cited at least three of the same cases

relied upon by the Tennessee Court of Appeals and eloquently stated its reasoning to the effect that

> Whether the reason is called laches, estoppel, waiver or public policy, challenges to the procedural validity of a zoning ordinance and constitutional based thereon must be brought within a reasonable time from enactment of the ordinance. If not brought in a timely manner, the plaintiff will be barred from challenging the zoning ordinance.

(*Id.*). In the instant case, Petitioner resided in Nashville in 1985 and not some other state. Petitioner's reliance on *LaSalle National Bank v. City of Evanston*, 179 N.E.2d 673, 675-76 (Ill. 1963) is similarly misplaced because the challenge in that case went to the *substance* of the zoning ordinance, not to the procedure by which it was adopted. Thus, it is irrelevant to the instant case. Illinois follows much the same rule as Tennessee in procedural challenges. *Smith v. City of MaComb*, 352 N.E.2d 697, 703 (Ill. Ct. App. 1976).

The policy of the State of Tennessee, applicable to challenges to zoning ordinances, as stated by the Tennessee Court of Appeals, does not conflict with 42 U.S.C. § 1983, and complies with federal policy to the extent that there must be some limitation to the right to bring procedural challenges to the adoption of statutes. Moreover, Tennessee's policy is fully consistent with the majority rule among the states. There is no need for the Supreme Court to consider this matter.

C. Petitioner had Adequate Post Deprivation Remedies under Tennessee Law.

In the event a court determines that the procedural arm of the Due Process Clause applies to a case, it still must find that state law does not provide an adequate remedy before allowing recovery. *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984). In the event that a deprivation of due process was caused by a random, unauthorized, negligent or intentional act of a state employee so that a pre-deprivation hearing is impracticable, then due process is satisfied if the state provides an adequate post-deprivation remedy. (*Id.*). The random and unauthorized act cannot be the result of a state law or established procedure. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982). Further, a pattern of practice of such acts, in violation of state law, will not fall into the category of a random or unauthorized act because a pre-deprivation hearing is possible in such a situation. *Zinerman v. Burch*, 494 U.S. 113, 135-37 (1990).

Petitioner claims that the decision of the Tennessee Court of Appeals means that she has no remedy under Tennessee law. However, she overlooks at least two remedies that were available to her. In 1997, the Historic Zoning Commission denied her request for a variance of the guidelines adopted under the 1985 Ordinance. (R. 184). At that point, Tennessee law provided her an appeal to a court of record through common-law certiorari. (T.C.A. § 27-9-101, *et seq.*) Although such appeals are confined to the administrative record, the court reviews whether the administrative body's action was arbitrary or capricious. *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996).

Constitutional issues may also be raised in such a proceeding, *Willamette Industries, Inc. v. Tennessee Assessment Appeals Commission*, 11 S.W.3d 142, 150-51 (Tenn. Ct. App. 2000), and attorney fees are recoverable if authorized by law. *Wimley v. Rudolph*, 931 S.W.2d 513, 516-17 (Tenn. 1996). It is impossible to know how Petitioner would have fared under such a proceeding, but the courts might have looked more favorably on her case had she expeditiously sought a remedy.

The other remedy available to Petitioner would be for inverse condemnation for damages under T.C.A § 29-16-123 for a regulatory taking. *Davis v. Metropolitan Gov't*, 620 S.W.2d 532, 534 (Tenn. Ct. App. 1981).

The failures on the part of the Metropolitan Government to provide notice were obviously random, unauthorized violations of state law. Staff personnel at the Historic Zoning Commission, most likely overlooked the requirements and failed to follow through but even if the oversight was intentional, it makes no difference. There is nothing in the record to indicate that the failure was part of any policy or practice of misconduct. Therefore, the undisputed facts bring this case within the category of random and unauthorized acts.

Tennessee law provided Petitioner with at least two potential post-deprivation remedies against the Metropolitan Government. Therefore, there has been no deprivation of procedural due process of law.

CONCLUSION

For the reasons stated above, the Metropolitan Government respectfully submits that it did not deprive Petitioner of any right guaranteed by the Due Process Clause of the Fourteenth Amendment; that the decision of the Tennessee Court of Appeals did not violate the Supremacy Clause and that Tennessee law provided adequate post-deprivation remedies. Therefore, the Metropolitan Government respectfully requests this Court to deny the Petition.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

MARGARET HUDSON,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

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T.C.A. §13-7-406 5

TENNESSEE CONSTITUTION:

Article XI, Section 1 8

Article X, Section 2, Constitution of 1796 8

I. REPLY TO RESPONDENT'S DUE PROCESS ARGUMENTS

Respondent argues that "[g]enerally speaking, the procedural arm of the Due Process Clause of the Fourteenth amendment (sic) does not apply to the adoption of a statute that affects more than a few people." Res. Br., p. 8. With one exception, the Circuit Court cases cited by Respondent in its brief at pp. 8-10 in support of its argument that the Due Process Clause does not apply in this case involved regulation that applied to the community in general or to a broad geographic area which distinguishes them from the case at bar.

In the one case cited by Respondent that involved a similar factual situation to that involved in the case at bar, *Brody v. City of Mason,* 250 F.3d 432 (6th Cir. 2001), the Sixth Circuit held that plaintiffs were entitled to procedural due process. 250 F.3d at 437. ("This Court has held that in the context of administrative zoning decisions, the process must provide sufficient notice to the affected landowners and an opportunity to be heard in opposition.") Unlike in the case at bar, in *Brody,* the plaintiffs were determined to have received procedural due process.

As Respondent notes in its Brief, "[t]here is no dispute that issues of proper notification to Petitioner arose in the context of legislation that increased the size of the existing historic district by 72 properties to reach a total of 157 properties in all." Res. Br., p. 8. Of these additional 72 properties, only 27 were considered to be historic and 45 non-historic structures in 1985. [Appendix E & F, Nos. 11 and 13, pp. 25(a) - 27(a).] The zoning action that is the focus of this appeal was limited to a specific, small geographic area and exceptionally affected a limited number of individuals who owned historic structures in that area.

As Judge Posner noted in a case relied upon by the Respondent, *Indiana Land Co., LLC v. City of Greenwood,* 738 F.3d 705 (7th Cir. 2004), the rationale for the general rule that procedural due process considerations do not apply to legislation is that legislation normally is general in scope rather than targeted on a specific individual and that its generality provides a safeguard that is a substitute for procedural protection. 378 F.3d at 710.

However, in *Indiana Land Co.,* Judge Posner recognized that legal principles are limited by their rationales. He noted that the tinier the group burdened by legislation, the weaker the equal burden rationale and the stronger the case for granting due process rights. 378 F.3d at 710. Justice Blackman made the same point in his concurring opinion in *O'Bannon v. Tour Court Nursing Center,* 447 U.S. 773 (1980), where he noted:

> "...When governmental action affects more than a few individuals, concerns beyond economy, efficiency and expedition tip the balance against finding that due process attaches. We may expect that as the sweep of governmental action broadens, so too does the power of the affected group to protect its interests outside rigid constitutionally imposed procedures. Moreover, the case for due process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual becomes more determinately within the decisionmaker's purview. For when government acts in a way that singles out identifiable individuals -- in a way that is

> likely to be premised on suppositions about specific persons -- it activates a special concern about being personally talked to about the decision rather than simply being dealt with." *Citing* L. Tribe, *American Constitutional Law,* § 10-7, pp. 503-504 (1978).

447 U.S. at 800-801.

In the case at bar the Due Process Clause applies because the zoning regulations applied to a limited geographic area and further applied to a limited number of structures in that geographic area. The individuals affected by the zoning regulations were known to the Respondent, Respondent knew the precise nature of the effect of the regulations on historic structures and the Respondent failed to use the most reasonable means to give notice to Ms. Hudson of the proposed zoning changes. In short, Ms. Hudson was exceptionally affected by the zoning regulations because those regulations were not general in application and applied to a limited geographic area. Even in that limited geographic area, her house was one of the regulated historic structures while other houses, which were not historic, were unregulated.

The Metropolitan Government of Nashville argues that there must be an immediate and drastic impact on an ownership interest to trigger the application of the Due Process Clause. Res. Br. 11-12 Respondent appears to equate property contemplated by the Takings Clause with property contemplated by the Due Process Clause. These two concepts are not coterminous. If they were, welfare recipients whose benefits the state had otherwise properly terminated could claim the state must pay them for the fair market value of such benefits. This is clearly not the law.

Compare, Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (holding that welfare benefits may not be taken away without giving the recipient notice and an opportunity to be heard) and *Schroeder v. City of Chicago,* 927 F.2d 957, 961 (7th Cir. 1991) (concluding the Takings Clause did not apply to allegedly improper termination of welfare benefits). The Due Process Clause recognizes a wider range of interests as property than the Takings Clause. *Pro-Eco v. Bd of Com'rs of Jay County, Ind.,* 57 F.3d 505, 513 (7th Cir. 1995).

In its papers, Respondent does not appear to dispute that under Tennessee law, Ms. Hudson has the property right to maintain and use her property as she desires. *See, Humes v. Mayor and Aldermen of Knoxville,* 20 Tenn. (1 Hump.) 403 (1839). In applying its due process analysis, this Court focuses on the property right which has been taken. See, *Lujan Labor Commissioner of California v. G & G Sprinklers, Inc.,* 532 U.S. 189 (2001) (Due process analysis focusing on a contractual right which was fully protected by an ordinary breach of contract suit). In the case at bar, Ms. Hudson has been deprived of a present entitlement, her right as an owner of real property to maintain and use her property as she wishes. Such a right is a property interest protected by the Due Process Clause. *See, Washington Ex. Rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121 (1928). There is no question in this case that Respondent deprived Ms. Hudson of this right. Its zoning regulations prohibited Ms. Hudson from using vinyl siding on her house.

Respondent argues that the Due Process Clause does not apply because Ms. Hudson has adequate post deprivation remedies under Tennessee law. The case Respondent relies upon for this proposition, *Hudson v. Palmer,* 468 U.S. 517 (1984) recognized that where pre-deprivation process is impracticable, an unauthorized negligent or intentional deprivation of property by a state employee does not

constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for loss is available. 468 U.S. at 533. The rule in the *Hudson* case does not apply in the case at bar because pre-deprivation process was not impracticable. Indeed, Tennessee law required that notice be given to Ms. Hudson. T.C.A. §13-7-406.

Even if the rule of *Hudson v. Palmer* applied in this case, Respondent's argument is flawed. Respondent's argument that Ms. Hudson should have appealed the denial of her request for a variance from the zoning guidelines is nothing more than an argument that Ms. Hudson has failed to exhaust her administrative remedies. The law is clear that in a 42 USC § 1983 action, there is no requirement that a plaintiff exhaust her administrative remedies as a precondition to the assertion of such a claim. *Patsy v. Florida Board of Regents,* 457 U.S. 496, 516 (1982).

Similarly, the Tennessee law of inverse condemnation does not provide Ms. Hudson with an adequate remedy. Under Tennessee law, a zoning regulation must be confiscatory and deprive a person of the beneficial use of their property to give rise to a cause of action for inverse condemnation. *Bayside Warehouse Co. v. City of Memphis,* 470 S.W.2d 375 (Tenn. App. 1971).

In short, the situation presented in the case at bar is the very evil which Congress intended to address and alleviate when it promulgated 42 USC §1983. Ms. Hudson has no adequate remedy under Tennessee law for Respondent's violation of her constitutional rights. This conclusion is evidenced by the opinion rendered by the Tennessee Court of Appeals in this case. [Appendix B, 3a-11a].

II. REPLY TO RESPONDENT'S SUPREMACY CLAUSE ARGUMENTS

The Respondent argues that the ruling by the Tennessee Court of Appeals does not conflict with the Supremacy Clause because of statements made by the Court in cases in which it adopted a state statute of limitations into federal law in regard to §1983 actions. The rationale for the adoption of state statute of limitations into §1983 actions is that because "[s]tatutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right of enforcement in perpetuity." *Felder v. Casey*, 487 U.S. 131, 140 (1988). However, this consideration does not apply to a judicially promulgated statute of repose which is virtually unheard of in litigation.

The law is clear that "[l]imitations periods are creatures of statute, not common law ... Therefore, limitations periods are established by legislation and not judicial fiat." *Kerr Glass Co. v. Wilson*, 880 P2d 414, 418 (Ok. App. 1994); *see, also, Acxiom Corp. v. Leathers*, 961 S.W.2d 735 (Ark. 1998); *Shewbrooks v. A C and S., Inc.*, 529 So.2d 557, 564 (Miss. 1988) ("Limitations on the time within which an action may be brought are created by statute only. They are legislative, not judicial acts."); *New York State Labor Rel. Bd. v. Wyckoff Hts. Hosp.*, 59 Misc.2d 284, 298 NYS2d 576, 582 (1969) ("In the absence of a statutory provision the Court does not have the power to introduce and enforce such a limitation.")

Indeed, under Tennessee case authority, the Tennessee Court of Appeals in this case exceeded its authority by judicially promulgating a statute of repose. In Tennessee decisions on public policy are made by the

Tennessee Legislature and the Tennessee Supreme Court. *North River Ins. Co. v. Johnson,* 757 S.W.2d 334, 336 (Tenn. App. 1988). The Tennessee Supreme Court has recognized that under the common law there were no fixed periods for the commencement of actions. *Brown v. Hipshire,* 553 S.W.2d 570, 571 (Tenn. 1977). The Tennessee Supreme Court has specifically recognized that "[t]he policy undergirding limitations of action is legislative policy, not judicial policy." *Id.* The Tennessee Court of Appeals in this case did not address the *Brown* case or cite any Tennessee Supreme Court decisions in the opinion it rendered in this case.

This Court has noted that "[b]ecause the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow a state law." *Felder v. Casey, supra,* 487 U.S. at 139. 42 U.S.C. §1988(a), which provides the means by which courts can consider and adopt principles of state law as federal law applicable to §1983 actions, states, in pertinent part, that:

> "The jurisdiction in civil and criminal matters ... for the protection of all persons in the United States and their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States; so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is

> held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ..."

Unfortunately, the Tennessee Court of Appeals in dismissing Ms. Hudson's §1983 claims never referred to the Supremacy Clause and apparently was unaware of the existence of 42 U.S.C. §1988(a). [Appendix B, 3a - 11a]

Under the provisions of 42 U.S.C. §1988(a), there is simply no legal basis for the Tennessee Court of Appeals to adopt a court made statute of repose and dismiss Ms. Hudson's §1983 claims by judicial fiat.

Applying the first step under the 42 U.S.C. §1988 analysis delineated in *Burnett v. Grattan,* 468 U.S. 42, 47 (1984), there is no federal statute of repose applicable in this case.

The second step in the applicable analysis directs a court to apply "the common law as modified by the Constitution and statutes of the forum state". *Burnett v. Grattan, supra,* at 47; 42 U.S.C. §1988(a). Tennessee is a common law state. The effect of Article XI, Section 1 (Article X, Section 2, Constitution of 1796) of the Tennessee Constitution was to adopt the common law of England as it stood in 1776 before the separation of the colonies. *State v. Alley,* 594 S.W.2d 381, 382 (Tenn. 1980). Under Tennessee common law, there is no statute of limitations or repose. The common law in Tennessee as declared by the Tennessee Supreme Court is that courts are without power to promulgate limitations of actions. *Brown v. Hipshire, supra.* There is no statute promulgated by the Tennessee Legislature nor any provision in the Tennessee Constitution which can

be cited as authority for the Tennessee Court of Appeals' ruling in this matter. Respondent does not cite any such authorities in its Brief because they do not exist.

The final step in the 42 U.S.C. §1988 analysis is to determine whether the state law sought to be applied is consistent with the constitution and the laws of the United States. *Burnett v. Grattan, supra* at 47. "Any assessment of the applicability of state law to federal civil rights legislation ... must be made in light of the purpose and nature of the federal right." *Felder v. Casey,* 487 U.S. 131, 139 (1988).

The central purpose of the Reconstruction Era laws is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder v. Casey, supra,* at 141. §1983 accomplishes this goal by creating a form of liability that, by its very nature, applies only against a specific class of defendants: governmental bodies and their officials." *Id.* The Tennessee Court of Appeals' judge made "statute of repose" undermines §1983. Its entire purpose is to minimize governmental liability and immunize government conduct. The rule of law promulgated by the Tennessee Court of Appeals in this case is inherently unfair because Respondent is benefiting from its violation of Ms. Hudson's right to procedural due process. Respondent's failure to give proper notice to Ms. Hudson necessarily delayed her assertion of her §1983 claim.

Moreover, the statute of repose promulgated by the Tennessee Court of Appeals is not a neutral and uniformly applicable rule of procedure; it is a substantive rule imposed only upon individuals seeking redress for injuries resulting from zoning regulations promulgated in violation of federal procedural due process requirements.

For these reasons, the statute of repose promulgated by the Tennessee Court of Appeals is clearly inconsistent with the applicable federal law, 42 U.S.C. §1983. The statute of repose created and applied by the Tennessee Court of Appeals stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Perez v. Campbell,* 402 U.S. 637, 649 (1971).

In short, the Tennessee Court of Appeals' adoption by judicial fiat of a statute of repose directly conflicts with the provisions of 42 U.S.C. § 1983 and §1988 and violates the Supremacy Clause.

CONCLUSION

Petitioner respectfully urges the Court to issue a Writ of Certiorari to the Tennessee Supreme Court so that the action taken by the Tennessee Court of Appeals, which has no basis in the law, will be reviewed and reversed.

Respectfully submitted,

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